IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case number: FAIS 05497/11-12/ NC 1

In the matter between:

MARGARETHA ELIZABETH LAMBRECHTS

(In her capacity as executor of estate late Hester L Zandberg,
in terms of the letters of executorship issued by the Master of the
High Court dated 5 August 2013) **Complainant**

and

OPTIMUM CONSULTANTS (PTY) LTD **First Respondent**

JANNIE R VAN DER MERWE **Second Respondent**

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

A. INTRODUCTION

[1] On 23 November 2011, complainant filed a complaint with the Office against first and second respondent.

[2] The complaint relates to financial services rendered in respect of an investment in the Highveld 18 property syndication, which was promoted by PIC Syndications (Pty) Ltd. Details of the complaint and the response to it are set out in detail below.

B. THE PARTIES

[3] Complainant is Ms Margaretha Elizabeth Lambrechts in her capacity as executor of Estate Late Hester L Zandberg, in terms of letters of executorship issued by the Master of the High Court, dated 5 August 2013.

[4] First respondent is Optimum Consultants (Pty) Ltd, registration number 1998/020208/07, a duly registered company in terms of the laws of South Africa, with its principal place of business recorded as Optimum Building, 54 Schroder Street, Upington.

[5] First respondent is a licensed financial services provider as provided for in terms of the FAIS Act, with license number 9413. The license was issued on 12 October 2004 and is still in force.

[6] Second respondent is Jannie R van der Merwe, key individual of the first respondent through which he conducts his business.

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

C. BACKGROUND

[8] Before addressing the facts of this complaint, it is worthwhile setting out the background to this particular investment and the related syndications. For purposes of this determination, I will refer to the Highveld Syndication (HS) 18 syndication only.

[9] PIC Syndications (Pty) Ltd, (commonly known as Picvest), then an authorised financial services provider[1] and promoter, marketed the shares through a network of brokers.

[10] Picvest allegedly had a well-established network of investment consultants and a marketing network of approximately 800 accredited financial advisers who marketed the shares coupled with loan accounts.

[11] The intended syndication structure was that the investor would buy a share coupled with a loan account in a public company and the properties were meant to be registered debt free in the same public company. The shareholder would receive the necessary shareholder's certificate as proof of ownership.

[12] The marketing of the property syndications took place by means of published registered prospectuses.

[13] It was further intended that a head lease and buyback agreement with the company Zephan Properties (Pty) Ltd would ensure a stable monthly income over a specific period and secure capital growth in the property investment after a fixed investment term.

[14] What allegedly attracted investors to Highveld Syndication No 18 Limited[2], was the fact that their capital was secured by a guaranteed buy-back agreement. It was

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1 PICVEST Investments (Pty) Ltd with License number 20878, which has since been withdrawn, according to the Registrar of Financial Services.

2 Registration No 2003/030778/06, trading as Beacon Isle Syndication

noted that the shares would be bought back, 5 years from the date of the investment. Investors would enjoy ownership in the share capital of the syndication, an unlisted public company. The company will be the sole owner of the land and buildings.

[15] According to the prospectus and contrary to Notice 459 of Government Gazette 28690 of 2006[3], investors' funds were to be held in the trust account of attorneys, Eugene Kruger & Company Inc until the syndication company took occupation of the properties in question.

[16] It is a matter of fact that Picvest (Pty) Limited withdrew the funds from the attorneys' trust account, prior to the transfer of the properties, paid it to the sellers and without reference to the investors, cancelled the sale agreements between the syndication company and various sellers, and a company known as Orthotouch Limited, (Orthotouch) entered into agreement with the sellers and the syndication companies in terms of which Orthotouch would buy the properties from the syndication companies. The latter companies were later placed under business rescue in terms of the Companies Act 71 of 2008. Thus, none of the properties were ever transferred to the syndication companies, despite payment having been made.

[17] According to the Business Rescue Plan and the financial statements for HS18, the list of properties intended to be procured by HS18, were in fact transferred to the

[3] Notice provides that funds shall only be withdrawn from the trust account upon transfer of the immovable property into the name of the syndication company.

company. Investors were being paid a monthly income as initially intended, until such time that a notice was given that they could expect a reduction in their monthly income. It would appear that the properties had not been earning enough money to meet the monthly payments that had to be made to investors.

[18] The syndication company had been borrowing the shortfall from Zephan Properties. This is reflected in the financial statements as a loan from Zephan. This is a clear indication that investors' investments had been eroded as the borrowing increased, and the funds obtained were utilised to subsidise the unsustainably high monthly payments to themselves. Essentially, the underlying buildings simply couldn't generate the income that was promised to investors.

[19] On 4th of September 2008 the South African Reserve Bank appointed inspectors to investigate the activities of Picvest to establish whether it was conducting the business of a bank. This intervention saw a reduction in the income provided by some of the syndications, leading to the subsequent collapse of the schemes.

D. THE COMPLAINT

[20] The complaint in this matter was originally lodged by Phillipus Zandberg, the son of the late Mrs Zandberg. Since the passing of the mother, the executor was appointed. The latter supports the complaint. Complainant in his letter of complaint dated 23 November 2011 notes that he sought help from respondent during 2006 in connection with investing the savings of his late mother. Complainant says he had stressed the fact that his mother was fully dependant on the income generated from her savings. She could therefore not afford to take any risks with her money.

[21] During October 2006, the late Mrs Zandberg invested an amount of R335 000 with PIC Syndications (Pty) Ltd (PIC), following advice of respondent. The investment was in HS18. Complainant's mother was advised that the investment term was five years, after which his mother's capital would paid back. She was further advised that income of 9 % per annum on the sum invested would be paid as monthly income and would escalate annually. Complainant does not provide details of the escalation.

[22] It is worth noting that complainant signed a contract for the HS18 syndication, and the subsequent share certificate received also confirmed the investment in HS18, however, some of the documentation received from PIC and the attorneys refer to HS19.

[23] The amount invested by Mrs Zandberg was derived from a savings account she held with FNB. Mrs Zandberg also received a minimal income from a Sanlam product, as well as Government bonds. The total value of the Sanlam and Government bonds according to the record of advice is R900 000.

[24] Complainant states that they made the investment based on respondent's assurance that the capital amount was guaranteed in that investors were to receive shares in actual properties.

[25] During March 2011 investors were informed by PIC that the rental income was to be reduced by approximately 50%. Complainant also indicated that PIC would advise on the new duration of the investment. Complainant says it was at this point

that she realised she could lose her investment, especially given the variation of the investment period.

[26] Complainant subsequently contacted respondent to enquire about the status of the investment. Respondent denied having informed complainant that the investment was guaranteed and that the capital would be returned after five years. Respondent further advised that PIC could reduce the interest rate or extend the duration of the contract.

[27] Complainant stated that instead of receiving what was offered, his mother, [at the time] was paid a decreased amount of income. This coupled with the variation of the term of the investment suggested to complainant that he may have lost his mother's capital.

E. RELIEF SOUGHT

[28] Complainant wants respondent to refund the invested amount of R335 000, as well as loss of the monthly income.

[29] 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 in the HS 18 investment.

F. RESPONDENTS' RESPONSE

[30] During December 2011, in compliance with Rule 6(b) of the Rules on Proceedings of the Office of the Ombud ("Rules"), the Office referred the complaint to respondent advising respondent to resolve the complaint with his client.

[31] The parties attempted to resolve the matter, however, complainant subsequently informed the Office that the matter had not been resolved. Respondent filed his response to the complaint on 31 January 2012.

[32] The essence of respondent's response appears in the paragraphs below:

32.1 Respondent suggests that he cannot be held liable in his personal capacity for any losses because he could not have foreseen the complications that arose within PIC.

32.2 Respondent claims that since 2006 the guaranteed interest was paid in accordance with the agreement and the fact that the position changed in 2011 is not something he could have foreseen.

32.3 Respondent confirms having attempted to convey what the public company's reasons were for withdrawing the head lease agreements, as well as the buy-back agreements. As an intermediary, he was also taken by surprise and had to rely on the public company's directors for explanations.

32.4 Respondent denies informing complainant that there were no guarantees and that Picvest may change the interest rates and the terms of payment. Respondent however, states that he explained to complainant that owing to

the state of affairs of the syndications, Picvest could, at its discretion, pay interest late; and it appeared that there are no more guarantees of fixed terms.

32.5 Respondent indicated that since the problem arose, a business rescue plan had been put into place which again guaranteed investor capital, but that the original term of five years had now been extended by two years.

32.6 Respondent concludes that he did not render financial services in a negligent of wilful manner. He also stated that he did not treat any investor unfairly. Respondent denied transgressing any regulation.

32.7 Respondent added that since he acted as a representative of PIC (Picvest), in rendering financial services to complainant, none of the allegations could be brought against Optimum Consultants.

[33] Correspondence was addressed to respondent on 28 February 2012 and 15 March 2012 respectively, informing him that in the event that the matter is not resolved with complainant, the Office would commence investigation. Respondent replied by resubmitting his first previous response. A notice in terms of section 27(4) of the Act was subsequently sent to respondent on 25 June 2015 to which no further response has been received.

G. DETERMINATION

[34] The issues are:

34.1 whether respondent, in rendering financial services to complainant, violated the Code and the FAIS Act in any way. In specific terms, the question is whether complainant was appropriately advised, as the Code demands;

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

34.3 quantum.

H. LEGISLATIVE FRAMEWORK

[35] It is appropriate at this stage to set out the applicable provisions of the FAIS Act and General Code of Conduct, (the Code) which are relevant in the present matter.

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

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

(a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;

(b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;

(c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;"

Section 16(2) further provides that:

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

(a) the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;

(b) adequate and appropriate record-keeping;"

General Code of Conduct

[37] Section 3(1) provides that:

"(1) When a provider renders a financial service –

(a) Representations made and information provided to the client by the provider:

(i) Must be factually correct;

(ii) Must be provided in plain language, avoid uncertainty or confusion and not be misleading;

(iii) Must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client;

(iv) Must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction.

[38] 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 purpose of the advice, based on 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; and…."

Government Gazette Notice 459

[39] In order to get a better appreciation of the risks associated with property syndications and the kind of disclosures that should have been made in order to properly advise complainant in terms of the FAIS Act, one has to refer to the statutory disclosures contained in the Government Gazette[4], Notice 459 of 2006 (notice 459). These are minimum mandatory disclosures to be made by promoters of property syndicates. By extension, any provider who carries property syndications in his portfolio of investment, and recommends same to clients, must be aware of these and has an obligation to deal with these when advising his or her client. The aim, as set out in the Gazette, is to assist and protect the public when considering these investments.

[40] The Code requires providers to disclose to their client material information to enable consumers to make informed decision about the proposed transaction. Section 7 provides as follows:

[4] No 28690

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

(a) provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;"

[41] The material information about the investment is contained in the prospectus and application form. Before I deal with these documents, it is appropriate for me to highlight some of the provisions of notice 459:

a) Section 1(a) provides that:

"Statements, presentations and descriptions shall not convey false or misleading information about public property syndication schemes and/or omit material information during the public offer of shares. Material information is information which an investor needs in order to make an informed decision."

b) Section 1(b) states that:

"Investors shall be informed in writing that:

(i) public property syndication is a long-term investment, usually not less than five years;

(ii) there is a substantial risk, in that the investor may not be able to sell his shares should he wish to do so in the future;

(iii) it is not the function of the promoter to find a buyer should the investor

wish to sell his shares and that it is the investor's responsibility to find his own buyer."

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

"Funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle; or underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding."

d) Section 3(c) states that:

"The disclosure document, which is to be dated and signed by the promoter, shall contain a statement of proper due diligence (commercially and legally) with regard to the property and its tenants prior to the unconditional purchase thereof and he/she shall state that this was done and that he/she is satisfied with the results thereof."

Memorandum in respect of HS18[5]

[42] The following appears from the private placing offer document:

42.1 The offer opened on 13 June 2006 and closed on 11 September 2006. Complainant's investment was made on 12 October 2006, a month after the

[5] From the available information, offers in respect of HS18 were done by means of a "Proforma Private Placing" document dated 15 June 2006. The document indicates that subscription is offered by way of private placing directed at selected investors. No prospectus was provided to the Office.

offer had closed. This is illegal and respondent tenders no explanation for this.

42.2 The warning prescribed in section 1 of notice 459 is not clearly set out. Whilst it is noted that investment in property is regarded as a medium to long-term investment and that it is the responsibility of the investor to find a suitable buyer for the shares, there is no information about the high risk nature of the investment including a warning that the shares are not listed and that investors might not be able to sell the shares. In simple terms, the so called private placing violated the provisions of Notice 459 and respondent appears not to have noticed this. If he did, he would have dissuaded his client from investing with Picvest.

42.3 The following paragraph appears on page 5 of the private placing document: "*As soon as sufficient funds have been received by **"Eugene Kruger & Co Attorneys Trust Account"**, it will be utilised to enable the syndication to **take occupation** of the properties. These funds will be drawn on the instructions of PIC as per agreement between PIC and the investors. The unencumbered properties will be transferred into the name of Highveld Syndication No.18 Ltd t/a Beacon Isle Syndication."*

This is a further infringement of Notice 459. In terms of section 2 (a) of notice 459 investors' funds had to be secured in the trust account of an attorney and only paid out upon **registration of transfer** of the property and not on "occupation" of property.

I must accept that respondent had read the private placing document prior to advising complainant on this investment and must have seen this clause. Notwithstanding the violation, he saw it fit to advise his client. If respondent had not read the private placing document, then his conduct was nothing short of reckless. Notice 459 is about investor protection. In fact, the Registrar of Financial Services cancelled PIC's license for amongst, others, violating the notice[6].

Given the aforesaid discussion, it requires no genius to conclude that respondent was completely out of his depth when it came to this investment; thus, he could not have appropriately apprised complainant of the risks involved in violation of sections 8 and 7 of the Code.

Record of advice

[43] I will now deal with the record of advice[7]. Section 3 of the record indicates that respondent could not do a proper needs analysis because the client did not provide all the necessary information, thus a single need was addressed. The record does however, indicate that respondent was aware of complainant's financial position, i.e. her income and other financial products.

[44] Section 4 of the record deals with complainant's needs and objectives. Throughout the record of advice, it is indicated that complainant requires an investment which would guarantee her capital, and from which she would receive income that will increase annually. It is indicated that complainant had R335 000 to invest to

6 11 February 2014

7 The whole record where mentioned is translated from Afrikaans

provide a monthly income in the form of interest payments, which will be above the inflation rate. The income that was required had to be as close as possible to R3000 monthly in order for complainant to survive.

[45] What follows in section 4 is a comparison of products to be considered:

i) Bank fixed- term deposit – low risk with fixed interest rate across the term.

ii) RSA Retail bonds – no risk, no commission, fixed interest rate across the term.

iii) Unlisted property syndication – growing yearly income, guarantees available.

iv) Term annuity – tax friendly investment with fixed income, net capital guaranteed.

[46] The product that was selected by complainant was a property syndication investment in HS18. The reasons were noted as:

46.1 High starting interest rate (closest to need) of 9% that will escalate yearly (satisfies need).

46.2 Full capital (100% allocation) is guaranteed and refundable.

46.3 Income and capital protected by means of head lease agreement and buy back agreement.

[47] This is where the advice went horribly wrong in that respondent decided to compare apples with oranges. The unfairness here is that respondent compared the products in a self-serving way because one cannot compare a fixed deposit and

retail bonds to a property syndication investment without dealing with the specific risk entity question that features in the property syndication. We are referring here to the poor governance practices, the flagrant violation of the law and the lack of means to protect investors against director misconduct. None of the aforesaid statements in respect of a property syndication are correct. Nowhere is complainant advised that the investment is in fact high risk, illiquid and in this case, not even compliant with Notice 459 including the implications of the non-compliance. Even the undated letter from PIC, which respondent relied on was clearly a marketing aid, contradicting the information noted in the prospectus about the risk of the investment. Regrettably respondent did not act in the best interest of complainant by recommending the said product.

[48] Mrs Zandberg required guaranteed capital and a growing income; the product comparison falls short of the requirement, since respondent did not compare apples with apples. Respondent's own record of advice indicates that complainant required an investment which guaranteed capital and steady income with annual increases. The investment in HS18 was simply not suitable to meet those needs.

[49] Respondent on his own version admits in the needs analysis that under normal circumstances, taking into account complainant's need for guaranteed capital, a property syndication would not be indicated as a suitable investment vehicle for complainant. This is mainly because of the risk as well as the difficulty in reselling the shares. Respondent relies solely on the supposed guarantee of the head lease agreement as well as the buy-back agreement. Had respondent only conducted his due diligence, he would have realized that the investment was high risk and not

suitable for complainant's needs. Respondent's conduct violated the Code and the Act.

[50] Based on respondent's own analysis, complainant was classified as having a conservative risk profile. Respondent's analysis indicated complainant to be a moderately conservative investor. Despite classifying complainant as a moderately conservative investor, respondent still found it appropriate to recommend HS18. Complainant did not have capacity for risk and respondent knew this. Such information was always available to him. Taking into account complainant's age at the time, she did not have the means to recover from failure of an investment. Despite the aforesaid, respondent ignored his own risk analysis result and recommended the high risk property syndication investment based on the fact that it was different to other syndications and safer because of the head lease and buy back agreements. Respondent failed to act in complainant's interest.

[51] As to whether respondent may be held liable for the financial services rendered whilst acting in his capacity as representative of PIC, attention should be given to the definition of a representative[8]. 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[9].

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[8] 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…

[9] Nell v Jordaan FAIS 05505-12/13 GP 1

[52] In *Moore versus Black*[10], 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."

[53] 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[11]. Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lay not with the appellant as a representative but rested solely

[10] 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

[11] 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.*'

[54] Section 13(2)(b) of the Act[12] 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.

Did respondent comply with the FAIS Act and the General Code when rendering the financial services to complainant?

[55] The complaint centers on the question of appropriateness of advice by respondent.

[56] Considering the risks that have been covered in this determination including the very information respondent relied on, it is clear that the capital was not guaranteed and based on the performance of a future buy-back agreement as well as the head lease agreement. Furthermore, the promoters had no control over how these contracts will perform and therefore gave no guarantees.

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

[57] In short, this product was not appropriate for complainant's needs. Respondent operated under the misconception that the risk in this particular property syndication is low, when it always was high risk. Respondent ignored the outcome of his own analysis and proceeded to recommend the investment. Respondent did not act in accordance with section 8, section 7 and section 2 of the General Code.

I. CAUSATION

[58] Respondent is of the view that complainant's loss could not be attributed to his advice. He states that he could not reasonably have foreseen that the PIC investment would fail and was also surprised with the outcome.

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

[60] The issue of legal causation or remoteness question must still be addressed.

[61] I do not believe that the loss of complainant's funds falls under the realm of delictual "pure economic loss". The respondents' conduct resulted in direct loss of the complainant's capital or property. In this regard, I refer to the matter of *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[13] where it was held that:

'Pure economic loss' in this context connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the

[13] 2006 (1) SA 461 (SCA)

negligent act itself, such as a loss of profit, being put to extra expenses or the diminution in the value of property.

[62] In the event that I am incorrect (and I do not concede this) in finding that the complainant's loss is not "pure economic loss"; I deal with legal causation in the paragraphs that follow.

[63] Had the respondent acted according to his own risk analysis and considered the prospectus carefully, he would have realized that this was a risky investment not suitable for the complainant's needs and that there were insufficient safeguards against director misconduct or mismanagement. The test here is not whether or not a collapse, for whatever reason, was foreseeable; but whether or not the investment was appropriate for the complainant, bearing in mind her needs and tolerance for risk.

[64] The enquiry is whether, as a matter of public and legal policy, it is reasonable, fair and just to impose legal responsibility for the consequences that resulted from the conduct of the respondents in giving advice that was inappropriate in terms of the Act and the Code.

[65] It is easy to blame the loss suffered to director mismanagement or other commercial causes. The complainant's loss was not caused by management failure or other commercial influences. If the respondent did his work in accordance with the Act and Code, no investment in PIC would have been made, bearing in mind complainant's tolerance for risk. The cause of loss was the inappropriate advice to invest in a risky product. That the risk actually materialized, for whatever

reason, is not the cause of the loss. This would defeat the whole purpose of the Act and Code. 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 not fly in the face of public and legal policy and the provisions of the Act and Code.

[66] The reasonable foreseeability test did not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result; it was sufficient if the general nature of the harm suffered by the complainant and the general manner of the harm occurring was reasonably foreseeable. A skilled and responsible FSP, acting according to the Act and the Code, would not have advised complainant to invest in PIC. The loss suffered by complainant as a result of respondents' inappropriate advice was reasonably foreseeable by the respondent.

[67] It was also held in the matter of *Standard Chartered Bank of Canada v NedPerm Bank Ltd*[14] the above case that:

"as to the issues of loss and causation, that although the untrue report issued by the respondent had been a factual cause of the appellant's loss, the test to be applied to the question whether the furnishing of the untrue report had been linked sufficiently closely or directly to the loss for legal liability to ensue was a flexible one in which factors such as reasonable foreseeability, directness, the absence or

[14] 1994 (4) SA 747 (AD).

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

[68] It is appropriate to point out that in addition to these factors one has to take into account, in the circumstances of this case, that there is the Act and Code which all FSPs are bound to comply with as well as legal and public policy. All of which factors, when taken into account in this case, show that there is a sufficiently close connection between the respondents' advice and the loss of complainant's capital.

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

J. CONCLUSION

[70] For reasons set out above, I find that, in advising complainant to invest in PIC, respondents contravened sections 2, 3(1) (a) (i), 7 (1) and (2) and 8 (1) and (2) of the Code. I also find that this conduct was the cause of complainant's loss.

K. QUANTUM

[71] Complainant invested an amount of R335 000.

[72] Accordingly an order will be made that respondent pays complainant an amount of R335 000 plus interest.

L. THE ORDER

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

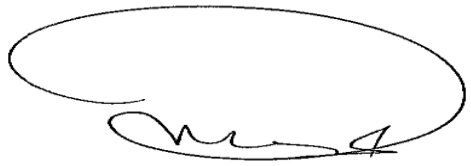
1. The complaint is upheld;

2. Respondents are ordered to pay to complainant, jointly and severally the one paying the other to be absolved, the amount of R335 000.

3. Interest on this amount at the rate of 10.25% from a date 14 days from date hereof to date of payment.

4. Upon receipt of payment, complainant will cede his right to any further claims to respondent.

DATED AT PRETORIA THIS THE 5TH DAY OF DECEMBER 2016.



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