

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 07602/15-16/ GP 1

In the matter between

LINDA-MARIÉ MIENIE N O

Complainant

and

JAN LABUSCHAGNE MAKELAARS CC

First Respondent

JAN HARM LABUSCHAGNE

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND
INTERMEDIARY SERVICES ACT 37 OF 2002 ('THE ACT')**

A. INTRODUCTION

[1] Mrs Maria Cecilia Terblanche was 80 years old when respondents advised her to invest R700 000 in Realcor, a property syndication scheme. Soon after making the investment, Realcor was placed under liquidation. Her funds were lost and no part of her capital was ever paid back to her.

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Fairness in Financial Services: Pro Bono Publico

[2] On the 19 March 2013, Mrs Terblanche was placed under curatorship by the Master of The High Court and her daughter R K Mostert (the curator) was appointed curator. Mrs Terblanche later passed away and her daughter Mrs Linda Mienie was appointed by The Master as executor of her late mother's estate.

[3] The curator, after finding out about this investment, challenged respondents conduct in advising Mrs Terblanche to make a high-risk investment in Realcor. She was unable to resolve the matter with respondents and filed a complaint in this office on behalf of her mother.

B. THE PARTIES

[4] The complainant is Linda Mienie who is cited herein in her capacity as executor in the deceased estate of Mrs Terblanche. The executor supports the complaint herein which was filed by the curator.

[5] The first respondent is Jan Labuschagne Makelaars CC a duly registered close corporation of 20 4th Street Naboomspruit. First respondent is an authorised financial service provider (FSP) with FSP No 15181.

[6] Second respondent is Jan Harm Labuschagne an FSP and key individual of first respondent. It is undisputed that second respondent carried on the business of an FSP through the first respondent. At all material times, the second respondent provided financial advice to Mrs Terblanche. For purposes of this determination I will refer to first and second respondents as "the respondent" unless the context requires a specific reference.

C. THE COMPLAINT

[7] The curator files this complaint on behalf of her mother (Mrs Terblanche). At the outset it is important for me to deal with Mrs Terblanche's health and status. The following is relevant:

- a) At the time when the investment was made, on the 16 April 2010, Mrs Terblanche was 80 years old. She and her second husband, Mr K Terblanche were living in a retirement village called Gholfpark Retirement Village.
- b) At the time of making the investment, Mrs Terblanche was already in an advanced state of Alzheimer's Dementia.;
- c) This office received two medical reports to confirm her condition. She was examined by her family doctor, DR S F van den Heever, on the 1 July 2010 and was diagnosed as cognitively and functionally compromised. The doctor examined her again on the 23 November 2010 and on the 17 February 2011. His report confirms that Mrs Terblanche's condition had become progressively worse.
- d) Dr van den Heever found that since his first examination, Mrs Terblanche was not able to take care of herself and was not capable of making decisions about her finances. He recommended that a curator be appointed for her.
- e) On the 7 September 2010, Mrs Terblanche consulted Dr M Van Niekerk a specialist neurologist. He filed an affidavit in support of an application to appoint a curator for Mrs Terblanche. His diagnosis was that she was suffering "Alzheimer Dementia".
- f) The Gauteng Provincial Division of the high court granted an order appointing a curator to take care of Mrs Terblanche's affairs and day to day requirements.

[8] At about the time the Realcor investment was made, Mrs Terblanche had deteriorated to the point where she could no longer recognise her own daughters' voices on the telephone. Nor was she capable of holding a normal conversation with her daughters. Mrs

Mostert recalls taking her mother to the bank to draw some money for her. Mrs Terblanche was unable to understand the transaction and confused R100 000 with R10 000. She was not capable of understanding basic financial transactions. The point being made is that there were no probabilities in favour of respondent's version that Mrs Terblanche requested the investment and understood the prospectus.

[9] It is not disputed by respondent that he advised Mrs Terblanche over some years and knew her well. Nor does he dispute that he had advised her to invest her available funds in property syndication schemes. In particular he advised her to invest R400 000 in Highveld Syndication No 15; R20 000 in Highveld Syndication No 18; R600 000 in Highveld Syndication No 21 and an, as yet, unknown amount in Sharemax Zambezi Retail Park Holdings Ltd. All these schemes failed and caused investors loss of their capital. The investments mentioned do not form part of this complaint. The curator is aware of these investments but cannot find any records or documentation. She requested information from respondent, but he was unhelpful stating that he was not required to keep documents for more than five years.

[10] The point being made is that respondent invested all Mrs Terblanche's available funds in property syndication. He did not offer her alternative products; nor did he concern himself with advising her to hold a diversified portfolio of investments in order to reduce her exposure to risk. It is also not disputed that respondent advised Mrs Terblanche to divest of some of her existing investments and put the funds into property syndication instead.

[11] Mrs Mostert wrote to respondent requesting the financial planning he had conducted for her mother. She also requested details of all commissions received by respondent and paid by respondent to anyone referring her mother to him. In response respondent merely stated that he was obliged to keep records for five years and he did not provide any

records. It appears that respondent either did not want to provide any records or he did not have any records.

[12] Mrs Mostert then makes a very important observation in her complaint. At the time the investment was made in 2010 the difficulties experienced by property syndication schemes was well publicised. This included Sharemax and PIC investments. Despite having knowledge of this, respondent went ahead and sold the Realcor investment to her aging mother who was *“an eighty-year-old very sick and stressed out woman”*.

[13] Mrs Mostert knew that her mother was unable to make any decision regarding her financial affairs. She believes that respondent was aware of this. She states that there was a relationship between Mr Terblanche (Mrs Terblanche’s second husband) and the respondent. She knows that Mr Terblanche was spending time at respondents’ offices and believes that he tipped respondent off that her mother had sold her property. Respondent wasted no time in visiting her mother and getting her to invest her funds in Realcor. Mrs Mostert is certain that it was her mother’s husband who was used by respondent to get her mother to invest. She believes that respondent paid Mr Terblanche a commission, something respondent refused to confirm or deny. However, Mrs Mostert, as proof of her allegations, provides a copy of the cheque used to pay the funds to Realcor. The cheque is drawn on ABSA Bank to pay “Purple Rain Properties 15 (Pty) Ltd” an amount of R700 000. The cheque is dated 16 April 2010. The cheque was signed by her mother but was written out by Mr Terblanche in the latter’s own hand writing. Respondent does not dispute this. According to Mrs Mostert her mother was incapable of writing a cheque and must have been persuaded to sign it by her husband.

[14] Mrs Mostert told Mr Terblanche, in August 2009, that he was not to conduct any business transactions on behalf of her mother as the latter had Alzheimer’s / Dementia. Some days

later, Mr Terblanche informed Mrs Mostert that respondent was coming to visit them. Mrs Mostert repeated her warning that he was not to do any transactions on behalf of her mother. But on the 14/15 April 2010 ABSA Bank called and informed her that R700 000 was transferred out of the family trust account (MTERC TRUST). This is a family trust into which her mother's funds were held. All the trustees, Mrs Terblanche and her three daughters had to sign before any funds could be transferred. Mrs Mostert states that all the trustees did not sign. A few days later Mrs Mostert discovered the abovementioned cheque. She confronted Mr Terblanche about this and he confirmed that he had signed the deal to invest in Realcor with respondent on behalf of Mrs Terblanche. Mrs Terblanche was very nervous and told her daughter that her husband "emotionally" forced her to do so. He said that she will benefit from the deal and will receive a lot of money seeing that the hotel will be finished at the time of the 2010 soccer world cup.

[15] Mrs Mostert telephoned respondent and told him that he had acted illegally. Mr Terblanche had no right to sign any deal on behalf of her mother and that the latter was as Alzheimer's sufferer.

[16] In her complaint, Mrs Mostert states as follows: "*Mt Labuschagne's advice and actions as a broker regarding Realcor Cape investment, was to say at the least reckless and unprofessional and not in the interests of Mrs Terblanche, and his advice was driven by the receiving of commission by himself more than the benefit of the client, Mrs Terblanche.*"

[17] Mrs Mostert informs that the Realcor investment was made when her mother "*was already in a state of dementia / first stages of Alzheimer's disease.*"

The Realcor Investment

- [18] Realcor began raising funds from the public to build a beach front hotel at Blaauwberg which will have 144 rooms. Mrs Terblanche is one of thousands of investors who invested in Purple Rain Properties, trading as Realcor.
- [19] Realcor was an authorised financial services provider that sold one- and five-year debentures (an investment in a long-term loan), as well as various classes of shares, to build the hotel. Investors were promised payment of their returns immediately and on a monthly basis. This promise was made and kept even though the hotel was still being built and the company had no other sources of income from which to fund the payments. It is also not in dispute that investor funds were being used to build the hotel. There was no security for investor funds and it appears that investors in fact carried all the risks.
- [20] Realcor was liquidated before the hotel was completed. Realcor targeted the elderly and those making provision for their income in retirement, offering them monthly interest payments and dividends of more than 10 percent. This was despite the fact that the hotel had not been built and there was no legitimate economic activity to generate the cash flows.
- [21] Realcor used various subsidiary companies, including Midnight Storm Investments, Grey Haven Riches and Iprobrite, to obtain funding from the public. The investment was publicised as safe and guaranteed, with minimal risk that investors would lose their capital, because it was in property.
- [22] In April 2008, in response to allegations that Realcor was raising money unlawfully from the public, the South African Reserve Bank ordered an inspection of Realcor, which was conducted by PricewaterhouseCoopers (PWC). The Reserve Bank found that Realcor was conducting the business of a bank without being registered as one. It prohibited

Realcor from raising further deposits and took steps to have investors' money repaid, appointing PWC as the managers to supervise Realcor for the Reserve Bank.

[23] Of relevance to this determination is that the Governor of the Reserve bank, Mr Tito Mboweni, appointed PWC as inspector on the 21 April 2008. This fact was widely publicised in the media and Realcor's brokers were informed about this. The Reserve Bank was of the view that Realcor Cape and its associated companies were conducting the business of a bank contrary to the Bank's Act.

[24] By the beginning of 2010 the collapse of property syndications, including Sharemax and PIC (Highveld Syndications) were making regular news. In spite of all the negative publicity and the intervention of PWC, respondent deemed the Realcor investment to be a suitable investment for an 80-year-old Alzheimer's sufferer.

[25] In less than three months after respondent advised Mrs Terblanche to invest, Realcor collapsed. Mr and Mrs Terblanche were left with no income and became dependant on Mrs Terblanche's daughters. In December 2010 Mr Terblanche committed suicide.

Respondents' Response

[26] The complaint as well as a letter in terms of Section 27 (4) of The Act was emailed to respondent. Respondent sent a comprehensive response to the complaint and the letter from this office. In the paragraphs below, I deal with respondents' response. Where convenient, I will deal with various responses simultaneously.

Prescription

[27] The first point made by respondent is that the claim has prescribed and in terms of section 27 of the Act, this office cannot accept the complaint for investigation. Respondent relies on the following:

- a) The investment in Realcor was made in April 2010 and the complaint was filed on the 12 January 2016;

- b) The curator was aware of the transaction early in 2010 and filed a complaint more than 5 years later; and
- c) The curator was “aware” of the problem only on the 19/03/2013 but elected to file a complaint years later.

Respondent relies on the prescription act as well as section 27 (3) (a) (i) of the Act.

[28] The period of prescription does not run from the date of the investment. In terms of Section 27 (3) (a) (ii) the period of three years commences on the date when the complainant became aware of an occurrence giving rise to the complaint. On the facts of this particular case the following will be considered:

- a) On respondents’ own version he does not dispute that the curator was aware of the problem on the 19 March 2013. The complaint was filed on the 12 January 2016; within the three-year period.
- b) At the time the investment was made, Mrs Terblanche was already suffering from Alzheimer’s disease. She was not capable of communicating her problems to her daughters, one of whom is the curator. Mr Terblanche was unhelpful and he committed suicide soon after the investment collapsed. Prescription cannot run against Mrs Terblanche as she did not have the mental capacity to administer her own affairs. See:

VAN ZIJL v HOOGENHOUT 2005 (2) SA 93 (SCA)

SOUTH AFRICAN MUTUAL FIRE AND GENERAL INSURANCE CO LTD v MAPIPA 1973 (3) SA 603 (E) (full bench)

- c) Although the curator was aware that an investment in Realcor was made, she did not know what became of the investment. Her mother was unable to give her any documents and the respondent was not particularly helpful. In fact, there were other property syndication investments made by Mrs Terblanche on the advice of

respondent, but the curator had no documentation. When the curator approached respondent for assistance the latter merely fobbed her off, stating that he was not obliged to keep records for more than five years. The curator wrote to respondent on the 3 November 2015 requesting information about her mother's investment. Respondent responded on the 5 November 2015 in an email in which he merely reminded the curator that any claim had already prescribed. He also referred her to the Highveld Syndication Action Group (PIC investments) and to Frontier Asset Management (Sharemax investments). As for the Realcor investment, respondent merely undertook to send the latest information about the company. Respondent was altogether unhelpful. He also knew that Mrs Terblanche had no understanding nor recollection of her investments due to Alzheimer's disease.

- d) After receiving correspondence from respondents, the curator realised that the latter was not going to be of any assistance. She then decided to consult another FSP and seek advice. She was advised that Realcor had collapsed and that respondent had acted illegally in advising her mother to invest in it. She then gathered as much documentation that was available to her and filed a complaint with this office.

[29] In the premises I conclude that the curators claim and complaint did not become prescribed and this office was obliged to accept the complaint for investigation.

Alzheimer's/Dementia

[30] This concerns a serious allegation that respondent sold the investment to Mrs Terblanche when she was suffering dementia brought on by Alzheimer's disease. The seriousness of the allegation is that when she agreed to invest, she was not capable of entering into a contract. This to the knowledge of respondent.

[31] Respondent had to respond to this allegation and possibly appreciated the seriousness of this allegation. His response is as follows:

- a) At the time of the transaction, Mrs Terblanche was “Compus Mentis” and respondent had no knowledge of her condition. She did not display any indication that she was suffering from dementia. She was, according to respondent, in full control of her financial matters and was physically mobile;
- b) Mrs Terblanche signed all the documentation respondent discussed and explained to her. She went “*on her own and alone to ABSA Bank where she withdrew the R700 000 and deposited the same amount into Realcor’s Trust Account. She then asked ABSA to fax the deposit slip to my office*”;
- c) Mrs Terblanche offered respondent and his wife lunch “every time we visited them”. She talked about various subjects and was well informed and showed no sign of dementia;
- d) In August 2011 Mrs Terblanche signed a statement where “she made certain declarations to assist the team who were supporting the business rescue of Realcor”. This document was seen by Mrs Terblanche’s daughter who sent it to respondent’s office. Mrs Terblanche then telephoned respondent to find out if he received the document. He states: “*we had a very positive conversation and I cannot believe that she was not by sound mind as now claimed by the curator bonis*”;
- e) On the 24 May 2010 respondent and his wife visited Mrs Terblanche in Tzaneen and gave her a copy of the Realcor contract and all the FAIS documents, which she signed. The meeting was attended by Linda Mienie.

[32] Respondent is adamant that there was nothing wrong with Mrs Terblanche and she had the necessary capacity to enter into the contract. However, his version is not supported by the undisputed facts:

- a) Respondent creates the impression that Mrs Terblanche conducted the transaction on her own and even went to the bank on her own. It is undisputed that Mrs Terblanche was unable to write her own cheque. The Cheque was made out in favour of "Purple Rain Properties 15 (Pty) Ltd" for an amount of R700 000. The cheque, it is undisputed, was written out by Mr Terblanche and Mrs Terblanche was asked to sign it. This happened on the 16 April 2010;
- b) Mrs Terblanche could not possibly have gone to the bank "on her own and alone". If she went to the bank at all, it must have been in the company of her husband. Respondent cannot support his version, that she went to the bank alone, with reference to any credible corroboration;
- c) The chronology of Mrs Terblanche's mental condition does not support Respondent's version, in fact the undisputed facts contradict his version. Mrs Terblanche was examined by Dr van den Heever on the 1 July 2010, 23 November 2010 and 17 February 2011. He certifies that she was no longer capable of taking care of herself and cannot make decisions about her finances. A copy of the Medical Certificate was provided;
- d) On the 7 September 2010 Mrs Terblanche was examined by a specialist, Dr M Van Niekerk, a neurologist, who diagnosed her as having "Alzheimer's Dementia". Incidentally, both doctors supported an application to the High Court for the appointment of a curator for Mrs Terblanche.
- e) Mrs Terblanche's daughters confirm that at the time of making the investment she was already suffering Dementia. She was unable to recognise their voices on the phone and was unable to draw money from the bank. She needed assistance. Mrs

Terblanche had to be moved to be closer to her daughter, before any investments were made, so that she could take care of her. It is not disputed that by April 2010 Mrs Terblanche was living on the property of her daughter.

- f) In August 2011 Mrs Terblanche was completely incapable of holding a “very positive conversation” with respondent on the phone, nor was she capable of signing documents to support business rescue.
- g) In April 2010 Mrs Terblanche was incapable of understanding a complex scheme such as the Realcor property syndication. Any 80-year-old, even ones without Alzheimer’s, is not likely to understand this complex investment.

[33] Respondent’s version is not supported by independent medical evidence. The objective evidence supports the version that at the time of purchasing this investment, Mrs Terblanche did not possess the requisite mental capacity. She was suffering Dementia for a period before the investment was made and progressively became worse. This is the finding of the medical experts.

[34] Mental incapacity to contract is a question of fact; did it exist at the time of contracting? It is not a matter of status, so it is not necessary that the party concerned be the subject of any order or action under the Mental Health Care Act 17 of 2002 or have a curator appointed. ¹

[35] The test: a court must determine whether the person concerned was or was not at the time capable of managing the particular affair in question – that is to say whether his mind was such that he could understand and appreciate the transaction into which he purported to enter. The complexity or simplicity of the contract may also be relevant.²

¹ Christie’s Law of Contract in SA 7th edition page 288

² PHEASANT V WARNE 1922 AD 481 AT 488

[36] The evidence is overwhelming that, at the time of entering into the contract, Mrs Terblanche did not possess the mental capacity required to enter into the contract. There are no probabilities that favour respondent's version that she was able to understand the Realcor investment. It is further noteworthy that at the relevant time, April 2010, the media had been reporting the collapse of property syndication schemes, including Sharemax, PIC Syndications and Realcor. If Mrs Terblanche was perfectly normal, she most likely would have at least heard about the demise of these investments. Bearing in mind that she had already invested her funds, at the relevant time, in Sharemax and PIC. Further, if she was normal, it is highly likely, in the circumstances, that she would not want to risk the balance of her funds in another property syndication, especially in one which was under inspection by the Reserve Bank.

[37] In the premises I find that Mrs Terblanche did not possess the required mental capacity to enter into a contract. The contract was void ab initio. Unfortunately, her estate cannot claim a refund from Realcor as the latter was placed under final liquidation.

Mrs Terblanche Requested the Investment

[38] Respondent's version is that Mrs Terblanche "approached him requesting an investment in Realcor" as she had heard about it from a friend. He claims to have made full and frank disclosure about the investment to Mrs Terblanche who signed a disclosure document acknowledging that she understood the investment. Although respondent claims to attach the signed disclosure document and record of advice, we were unable to locate this in the file.

[39] Respondent states that the risks in the investment was also disclosed to her and she signed the document. This document was not provided. Respondent states that Mrs

Terblanche “requested shares in Realcor, a property syndication, where the property would be (on completion) controlled by shareholders like her. The client was not satisfied with her investments in Insurance Companies, where her capital was accessed to pay monthly income to her. *It was her choice to diversify to Realcor, because she had already invested in other property syndications*” (emphasis added).

[40] Based on the facts before me, I am compelled to reject this version for the following reasons:

- a) Mrs Terblanche was altogether incapable of calling respondent and requesting to purchase shares in Realcor. If she actually heard anything about Realcor, it would have been that it was under inspection by the Reserve Bank.
- b) Respondents version is improbable. An 80-year-old Alzheimer’s sufferer does not ring up her broker and advise him that she intends to diversify her portfolio. What makes this version nonsensical is that respondent knew that she had invested in Sharemax and PIC (the investments were made on his advice) and also knew, at that time that these syndications had collapsed or were under investigation by the SARB. As a responsible FSP, if his client needed to diversify, why put more of her money in yet another property syndication? This is not diversifying a portfolio of investments.
- c) What makes respondent’s conduct so much more egregious is that he also knew that the SARB were investigating Realcor for contravening the Banks Act. He claims to have made full and frank disclosure, yet, even on his own version, he was obliged to disclose this to his client and advise her not to invest in Realcor. He could easily have foreseen that Realcor could also collapse, as did Sharemax and PIC. As it turned out, Realcor actually did collapse a mere four months after the investment was confirmed.

d) The curator's version is more probable. It was Mr Terblanche who tipped off respondent that his wife had sold her property and funds were available. It is Mr Terblanche who convinced his incapacitated wife to sign the documents. Respondent did not even disclose to Mr Terblanche that Realcor was already in trouble. Instead he paid Mr Terblanche a commission or tip-off fee for the investment (a fact which respondent does not deny). It comes as no surprise that Respondent is unable to produce a record of advice indicating the risks he explained to Mrs Terblanche.

Risk and Regulatory Oversight

[41] Respondent states that property Syndications were not considered as high risk. He compares this to listed shares which could drop in value. He is of the view that Property syndication was not high risk because the property was owned by investors and "the risks were in relation to property ownership". He points out that shares in commercial property with good leases were "easily sellable". This is equally nonsensical. Respondent somehow failed to notice that Purple Rain T/A Realcor did not own any leased commercial property and also had no discernible means to pay commissions and monthly interest to investors. Respondent must have realised that commissions and returns were being paid out of investors own funds. This type of property syndication is widely accepted to be risk capital. Which means that it is highly risky and it is not recommended that more than 20% of one's available funds be invested in it. Respondent advised Mrs Terblanche to invest **all** her funds in this type of investment. She was actually left destitute and dependent on her children.

[42] Respondent "strongly denies" that there was regulatory oversight in Realcor's business. Respondent claims to have "extensively researched any record of non-compliance of the Realcor Group." He justifies his position on the fact that no complaints were filed with the

Law Society, Financial Intelligence Centre and the DTI. It comes as no surprise that notwithstanding his “extensive research”, respondent failed to uncover the fact that, already in 2008, the SARB placed Realcor under inspection for contravening the Banks Act. In his own version, respondent admits that the SARB were “in office” at Realcor “since April 2008”. He somehow did not see this as a problem and failed to disclose this fact to his own client. Even if his client was not incapacitated, she would not have invested in a company being investigated by the SARB.

Foreseeability

[43] Respondent’s version is, it is not foreseeable that any investment may collapse. That in the case of Realcor no criminal or any other charges of contravention had been made against the directors, or other professional persons such as lawyers and accountants. Respondent blames the demise of Realcor on the actions of the Reserve Bank. This is rich coming from him as, at the time he sold the investment, he knew that Realcor was under investigation by the SARB and that PWC were already appointed to manage its business. The complaint against Respondent is not about the performance of the investment, it is about the realisation of the risks inherent in property syndication. The test is not about whether or not he could have foreseen the actions of the Reserve Bank; the test is whether or not his advice was appropriate at the time the investment was made. I will say more about foreseeability below.

Regulatory Framework

[44] Respondent then provides much detail to show that, in all respects, Realcor was compliant with the applicable regulatory and statutory provisions. I do not intend to summarise this as, for purposes of this determination, it is not relevant. He also proceeds to blame the SARB, PWC and “rogue officials” for the ultimate liquidation of Realcor. The reasons for Realcor’s liquidation are equally irrelevant to this determination. What is relevant is that

respondent advised his client to invest all her funds in high risk property syndication investments.

Section 9

[45] It is undisputed that respondent had advised Mrs Terblanche to surrender existing investments and to invest the proceeds in property syndication. In this regard, Respondent was obliged to comply with Section 9 (1) (d) of The Code. There is no evidence that he complied.

Appropriateness of the Investment

[46] The respondent took the trouble of providing lengthy explanations around Realcor and why it collapsed and that it was a legitimate investment. Of significance is that respondent failed to deal with the following:

- a) Why he deemed this investment suitable for an 80-year-old woman who had no tolerance for risk and who relied on her investments to support herself and her husband;
- b) Respondent had already advised her to invest all her funds in PIC and Sharemax. When more funds became available, he immediately advised her to invest in Realcor, another property syndication. He advised her to do so well knowing that Sharemax and PIC had collapsed and Realcor was under inspection. He did not explain how this amounted to acting in the best interests of his client;
- c) Respondent does not explain why he failed to inform Mr and Mrs Terblanche that Realcor was under inspection and being managed by PWC who were appointed by the SARB. This is highly relevant and material information he was obliged to disclose to his clients.

The Legal Framework

[47] This matter must be determined with reference to the following legal framework:

- a) The provisions of the Act, in particular section 16 (1) (a);
- b) The provisions of the Code, in particular sections 2, 3, 7, 8 and 9;
- c) The common law relating to delictual liability; and
- d) The common law relating to the contractual relationship between the parties, including the capacity to contract.

D. THE ISSUES

[48] The issues for investigation and determination amount to this:

- a) Did Respondent, in advising his client, conduct himself in terms of the General Code, in particular section 2; and
- b) Did the Respondent actually comply with the provisions of the following sections of the Code:
Section 3 (1) (a) (i) and (iii) ; Section 7 (1) (a); Section 8 (1) (a) and (c), Section 8 (2) and Section 9.
- c) Did respondent act in breach of his contract with Complainant;
- d) Did respondent enter into a legal agreement with Mrs Terblanche and was the contract with Realcor of any force and effect;
- e) Did Complainant suffer loss and if so, what was the cause of the loss and the quantum thereof.

E. APPLICATION OF LAW

[49] Bearing in mind the facts found to be proved and the conclusions to be drawn from them, the following findings can be made:

- a) Respondent failed to act honestly, fairly, with due skill, care and diligence;

- b) Respondent failed to act in the interests of his client and by his conduct compromised the integrity of the financial services industry. Respondent contravened section 2 of The Code;
- c) Respondent failed to provide full and frank disclosure of all the material information about Realcor, even when he knew that the SARB had intervened;
- d) Respondent failed to enable complainant to make an informed decision. Respondent contravened section 7 (1) (a) of The Code;
- e) Respondent failed to seek relevant information from complainant and failed to provide appropriate advice. Respondent failed to identify a product that was appropriate to complainant's risk profile and financial needs. Respondent contravened section 8 (1) (a), (b) and (c) of The Code;
- f) Respondent failed to comply with Section 9 of The Code bearing in mind that the Realcor investment was a replacement investment; and
- g) Respondent took advantage of the fact that Mrs Terblanche had no capacity to make financial decisions and his conduct can only be described as morally reprehensible.

[50] The fact that respondent was in breach of the Act and The Code does not mean that he is therefore liable for complainant's loss. There is a breach of contract as well as a claim in delict.

[51] Further, this office as well as the Board of Appeal has consistently found that there existed a contract between FSP and client. It was an express, alternatively implied term of the contract that Respondent, in carrying out his obligations, will comply with the provisions of the Act and The Code. For reasons already stated, respondent was in breach of this term. A consequence of this breach was the loss of complainant's capital. On the facts of this

case it must be borne in mind that Mrs Terblanche was not legally capable of entering into any contracts.

[52] In a number of recent judgements in the high court, it was found that complainants claim is one in delict based on negligence. Once it is established that the respondent gave financial advice, two questions arise:

- a) did the respondent comply with his legal duties towards the client; and
- b) whether in terms thereof the respondent acted wrongfully and negligently.

For reasons set out below; the first question must be answered in the negative and the second question in the positive.

[53] A reasonably competent FSP in the position of respondent would have done the following:

- a) Would have been concerned that Mrs Terblanche was suffering from dementia and was obviously not capable and did not have capacity to enter into any contracts and will not be capable of making financial decisions;
- b) Would not have manipulated Mr Terblanche into facilitating the investment;
- c) Would not have given financial advice to an Alzheimer's sufferer;
- d) Would have consulted with Mrs Terblanche's care givers, namely her children;
- e) As a basic step he was expected to read and understand the prospectus and the annexures thereto and explain it to Mrs Terblanche in plain language. By all accounts, this was not possible as Mrs Terblanche was incapable of understanding. Nevertheless, if one considers that the whole transaction was completed very quickly, it is unlikely that respondent explained the investment to his client, and in particular the risks in the investment;

- f) Would have realised that since Realcor was under intervention by the SARB, that he should not be recommending the investment to any of his clients, let alone one with no legal capacity to contract;
- g) Would have made full disclosure of the fact that her Sharemax and PIC investments were in trouble and for the same reason, Realcor was under investigation. On respondent's own version, that Mrs Terblanche was normal, he was obliged by The Code, and plain decency, to tell her about this.
- h) Made a point of understanding how Realcor intended to pay his commission and investors returns bearing in mind that the latter owned no leased commercial property and enjoyed no trading history and did not have any independent means of making these payments (these facts are stated in the prospectus). Significantly, respondent had a duty to explain this to Mrs Terblanche;
- i) Would have noticed that contrary to what was initially stated in the prospectus, it then informs that investor funds will not be kept in trust but will be paid out to the developer of the hotel to fund the construction (this too is stated in the prospectus), this had to be explained to Mrs Terblanche;
- j) Would have noticed that the shares will not be easy to dispose of, the promoter offered no assistance in disposing of the shares and the onus was placed on the investor to find a buyer (also stated in the prospectus).

Clearly by failing to draw complainant's attention to the above information, respondent failed in his legal duties to his client.

[54] The respondent also acted wrongfully and negligently; he was under a legal duty to make a disclosure of these facts to complainant. Respondent acted negligently in not making full and frank disclosure thereby depriving complainant of the right to make an informed decision.

[55] The respondent must be judged by the standard of a reasonably competent FSP in the same circumstances. As I mentioned above, respondent must also be judged by the standards expected of an FSP with similar qualifications and experience. Then the inquiry must progress to the next question: would a reasonably competent FSP have advised complainant differently. It is overwhelmingly clear that a reasonably competent FSP would not have advised Mrs Terblanche to invest in Realcor as it was under intervention by the SARB, this was a manifestly high-risk investment where there was a prospect of losing all the capital. The SCA in *Durr v ABSA Bank*, Schutz JA stated as follows:

“The reasonable person has no special skills and lack of skill or knowledge is not per se negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity.”

“Liability in delict arises from wrongful and negligent acts or omissions. In the final analysis the true criterion for determining negligence is whether in the particular circumstances of the conduct complained of falls short of the standard of the reasonable person.”

[56] Respondent was the factual and legal cause of complainant’s loss as his conduct as an FSP fell far short of the standard of a reasonable FSP.

I refer to the following decisions:

Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another 2000 (1) SA 827 (SCA).

OOSTHUIZEN v CASTRO AND ANOTHER 2018 (2) SA 529 (FS)

CENTRIQ INSURANCE COMPANY LTD v OOSTHUIZEN AND ANOTHER 2019 (3) SA 387 (SCA)

Unconscionable Conduct

- [57] It is unfortunate that, on the facts of this matter, I am compelled to make comment about Mr Jan Labuschagne's conduct in dealing with Mrs Terblanche. The latter was 80 years old, frail, vulnerable and suffering from Alzheimer's /Dementia. She was legally incapable of entering in to a contract. Respondent knew her well as he had previously advised her to invest in Sharemax and PIC.
- [58] At a time when he knew that the Sharemax and PIC investments were in trouble, he decided to advise her to invest in yet another property syndication scheme. To make matters worse he also knew that Realcor was under investigation by the SARB.
- [59] Mr Jan Labuschagne was not acting in the interests of his client; he was squarely focused on the lucrative commission on offer from Realcor. He has brought the Financial Services Industry into disrepute and he is not fit to be a licensed FSP. His conduct was unconscionable (in this regard I also refer to Section 40 of the Consumer Protection Act 68 of 2008; Mrs Terblanche was entitled to the right to fair and honest dealing).
- [60] In the premises, I refer this determination to the FSCR, FAIS department and Licencing department for further attention.

F. QUANTUM

- [61] Mrs Terblanche invested R700 000 in Realcor. The company was finally liquidated and her entire capital is lost. The cause of the loss was respondents conduct.

G. THE ORDER

- [62] In the premises, I make the following order:

1. The complaint is upheld;
2. Respondents are ordered to pay to Mrs Terblanche's deceased estate an amount of R700 000, jointly and severally;
3. Interest is payable at 7.75% per annum on the capital amount from a date 14 days from service of this order to date of payment.
4. Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28(5)(b)(i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 13th DAY OF OCTOBER 2020.



ADV NONKU TSHOMBE

OMBUD FOR FINANCIAL SERVICES PROVIDERS