IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS PRETORIA

Case Number: FAIS 04376/12-13/ GP 1

In the matter between

JEANNE PEENS **Complainant**

and

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

BAREND PETRUS GELDENHUYS **Second Respondent**

STEPHANUS JOHANNES VAN DER WALT **Third Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT[1] ('hereinafter the FAIS ACT')

A. THE PARTIES

[1] Complainant is Jeanne Peens, a 75 year old[2], female pensioner, whose details are on file with the Office.

[2] First respondent is Huis van Oranje Finansiële Dienste Bpk (HVO), a private company duly incorporated in terms of South African law with registration

[1] No.37 of 2002.
[2] At the time of the lodging of the complaint in August 2012 complainant was 71 years old.

number 1995/006025/06, having its principal place of business at Office 14, Kleinfontein, Uit en Tuiswinkelsentrum, Rayton.[3] First respondent was an authorised financial services provider in terms of the FAIS Act, with license no. 687. The license was issued in 2003 and it lapsed on 11 July 2011.

[3] Second respondent is Ben Petrus Geldenhuys, a key individual and representative of the first respondent.

[4] Third respondent is Stephanus Johannes Van Der Walt, an adult male who was at all material times an authorised representative of first respondent.

[5] At all material times hereto complainant dealt with second and third respondents. For convenience I refer to first, second and third respondents as "respondent" unless otherwise specified.

B. INTRODUCTION

[6] On the advice of respondent, complainant invested a total amount of R125 000.00 (one hundred and twenty five thousand rands) in Realcor.[4]

[7] Complainant is one of thousands of investors who invested in Purple Rain Properties 15 (Pty) Ltd trading as Realcor Cape, now liquidated.[5] Realcor was an authorised financial services provider registered with the Financial Services Board, under license number 31351.

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[3] It appears that first respondent has been registered or converted into another company which bears the same name of HVO but with a different address as reflected on its letterhead; HVO Beherend Beperk registration no: 2004/024002/06 Collins Laan 1241Moregloed Pretoria.

[4] On three occasions namely; on 12 August 2009, 16 July 2010 and 15 October 2010.

[5] The background to the Realcor collapse is discussed in detail *in Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 at para 5-15 per Eloff AJ. Furthermore, see determination *Carel J Weideman and Anna MJ Weideman v Huis Van Oranje Beherend Beperk and Stepahnus J Van Der Walt* FAIS 09071/10-11/MP1 7 November 2012.

[8] Realcor used various subsidiary companies for purposes of obtaining funding from the public for its development projects.

[9] These companies included Midnight Storm Investments ("MSI"), which owned the Blaauwberg Beach Hotel (hereinafter, the hotel), Grey Haven Riches 9 Ltd and Grey Haven Riches 11 Ltd and Iprobrite Ltd (hereinafter, collectively referred to as "Realcor"). It is not clear whether Realcor had employees and assets, except the hotel. This property was registered in the name of MSI.

[10] Realcor subsidiaries raised money from the public by issuing the investing public with one (1) year debentures, five (5) year debentures and various classes of shares.[6] In this way Realcor was able to raise substantial amounts of money from the public, funds which were mainly earmarked for the construction of the hotel[7].

[11] The debentures and shares were marketed as attractive on the basis that investors would receive monthly interest payments and dividends before and after the construction of the hotel.[8] The target market for the Realcor shares and debentures were mainly the elderly or adult persons making provision for post-retirement income. Whilst an ordinary bank savings account would fetch single digit interest per annum, Realcor investors were promised more than 10% interest per annum. In the absence of legitimate economic activity that would generate cash inflows, it is not clear how this return was to be achieved.

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6 The capital structure involved a combination of a share and a debenture/loan and conversion of debentures into shares. Whilst a debenture earns interest, a shareholder is entitled to a dividend provided they are declared and there is profit available for distribution.

7 See Southern Palace Investments 265 (Pty) Ltd at para 10.2. See also one of the pro-forma Record of Advices.

8 See a Realcor letter dated 13 April 2010 confirming that complainant is a shareholder in the hotel. This letter gives a false impression that the investment will be used only for the hotel. To the contrary it appears that the investment money was used for other Realcor subsidiaries not only for the Hotel.

[12] Meanwhile the investment was publicized as safe and guaranteed and that there was minimal risk of loss of capital as the investment was “in property” such as the hotel.

[13] Pursuant to concerns and allegations raised by members of the public that Realcor was obtaining money from the public unlawfully, on 21 April 2008, the South African Reserve Bank (hereinafter, the “Reserve Bank”) conducted an inspection through PricewaterhouseCoopers (“PWC”) on Realcor in terms of Section 12 of the South African Reserve Bank Act.[9]

[14] Through this the Reserve Bank found that by obtaining funds from the public, Realcor had conducted the business of a bank without being registered or authorised to operate as a bank. Realcor was thereafter placed under supervision and on or about 28 August 2008, the Reserve Bank appointed PWC as managers of Realcor.

[15] Subsequently thereafter the Reserve Bank prohibited Realcor from obtaining further deposits of money from the public, and took steps, by appointing PWC, to ensure that investors’ money and any accrued bank interest is repaid.

[16] Attempts to put Realcor companies under business rescue as an alternative to liquidation failed.[10]

[17] An uncompleted building structure of the hotel was eventually sold when MSI was liquidated by one of its major secured creditors, First National Bank (hereinafter “FNB”).

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9 Act No 90 of 1989.

10 See Fin24. 23 May 2013. *Realcor hotel’s R 50m tag dashes dreams*. [Online] Available from: http://www.fin24.com/Companies/Property/Blaauwberg-Hotel-fetches-R50m-20130523 [Accessed on 28 April 2016].

[18] Realcor was eventually liquidated. It does not appear from the documents on file that a liquidation dividend was paid by Realcor to its investors. Furthermore, it is not clear what the final report of the Reserve Bank's managers was in respect of re-payment of monies to investors including complainant, if there was any. Based on the opposing submissions (made by FNB) to one of a few unsuccessful business rescue proceedings, the hotel was eventually sold for approximately R 50 million; all or the majority of which is likely to have been paid to FNB as one of the secured creditors. On the basis of this, it can be inferred that Realcor's investors did not and are unlikely to have received anything.

[19] As a result of Realcor's liquidation, investors lost their investment capital, accrued interest and/or dividend payments.

[20] In light of the liquidation, many of Realcor's investors approached this office for assistance in order to claim their investment capital from the brokers, who facilitated the investment into Realcor.

[21] The brokers that sold Realcor investments tried to avoid their responsibilities under the FAIS Act (towards their clients) by contending that the Reserve Bank's intervention in Realcor as set out above was the cause of the Realcor collapse. Using this reasoning, the brokers applied to Court[11] for an order indemnifying them from their clients' claims. Instead of honoring their obligations under the FAIS Act, the brokers asked the Court for an order to hold PWC liable for losses of investors' investments on the basis that the

[11] See a judgement that was delivered on 7 October 2014: *Willem Van Zyl & Deon Pienaar v PricewaterhouseCoopers & Others* HC WC Case No.: 12511/2013. Mr Van Zyl and Pienaar.

debentures were sold to the public whilst PWC were managers and in charge of Realcor.

[22] In the Willem Van Zyl & Deon Pienaar v PricewaterhouseCoopers & Others judgement[12] it was found that the Reserve Bank had only supervised Realcor and did not take control of its daily operations and that Realcor remained in the hands of its directors until it was liquidated.[13]

[23] However, as alluded to above, the Court found that PWC only supervised Realcor and did not take control of its daily operations; that Realcor remained in the hands of its directors until it was liquidated. This judgment therefore implies and supports the intention of the legislature that financial services providers be held accountable for the consequences of their conduct when rendering financial services to clients.

C. COMPLAINT

[24] Complainant states that she contacted third respondent following respondent's marketing campaign on Radio Pretoria in or around the first half of 2009. Complainant states that there had been no meetings held with respondents prior to this engagement. Complainant states that this was her first "big investment" and relates how, on the question of whether Realcor was a suitable investment during the course of the engagement, third respondent responded positively. Complainant states that the forms where she committed

[12] *Ibid*.
[13] It appears that PWC's mandate continued until Realcor was liquidated when the liquidators took control.

to invest her funds were signed summarily on the date of meeting respondents.

[25] Among the forms signed by complainant during the sale was a pro-forma form titled “Record of Advice in terms of section 8(4)”). I will later address the relevance of this form. This form in essence states that complainant did not want to give information necessary for a determination of her needs. In her letter of complaint to this office, complainant contends that (that she did not want to provide information) was a lie. Complainant’s version is that at that particular time, she had not been aware that an “affordability and risk profile analysis” ought to have been conducted before the conclusion of the sale.

[26] According to the complaint, neither second nor third respondent (despite having concluded three sales) brought this to the complainant’s attention.

D. RELIEF SOUGHT

[27] Complainant seeks repayment of her investment capital.

E. INVESTIGATIONS BY OUR OFFICE

[28] Prior to lodging the complaint with our office the complainant states that her husband had, on at least two occasions, spoken to second respondent about the media reports suggesting that interest payments had stopped.

[29] Complainant states that second respondent’s responses appeased their anxiety. On the second occasion, in particular, complainant recalls how first respondent stated that “it was only a matter of time before Realcor recovered” and that he himself had also invested in Realcor.

[30] When these assurances came to naught, complainant lodged a complaint with this office on 28 August 2012 following broad reporting in the media about "interest" payments having ceased.

[31] The complaint was referred to respondents to resolve in terms of Rule 6 (b) of the Rules on Proceedings of this office. After the matter was not resolved and on 24 June 2015, this office issued a second notice in terms of Section 27 (4) of the FAIS Act. All these notices[14], and their respective responses were read together. The latter notice informed respondent that the matter had been accepted for investigation, and called upon respondent to:

a. provide copies of its file of papers and any other documents supporting its case and compliance with the FAIS Act and Code;

b. it called for information on the basis that the recipients of the notice were viewed as respondent and that their failure to provide sufficient explanation could see them being held liable;

c it called on respondent to provide a comprehensive response, with necessary supporting documentation;

d. it warned respondent that this office would, upon receiving the response with supporting documents, determine the complaint on the basis of information submitted; and

e. that to the extent that respondent failed to respond to the notice, the matter would be investigated and determined in the absence of a response from respondent.

[14] Being the Rule 6 (b) notice, and the Section 27 (4) notices of 28 October 2012 and 24 June 2015, respectively.

[32] Respondent submitted a response to all notices. It would, however, appear that respondent did not heed the contents of the second section 27 (4) notice, simply forwarding the response submitted to the rule 6 (b) notice.

[33] In what follows I set out the salient aspects of respondent's response.

F. RESPONDENT'S RESPONSE

[34] The response submitted by respondent to the notice in terms of rule 6 (b) was prepared by second respondent. I deem it necessary to reproduce what I believe to be the essence of the respondent's defence:

"*2.5 Statement of how this product was entered into:*

Mrs J Peens heard the advertisement on Radio Pretoria regarding the Investment. She enquire about the investment and all information about the Investment has been discussed. She has been a client of Realcor since 31 July 2009 when she invested R 100 000.00. It matured and she re invested it on the 15 April 2010. On the 15 October 2010 she invested a further R 25 000.00.

2.6 The allegation made by client in his complaint that the representatives did not asked him for information to a needs analysis is not true as the client signed the document "Adviesrekord ingevolge artikel 8(4) van die Algemene Kode where the client agree on it that it is not necessary to do a needs Analysis." (Underlining own emphasis)

(Copied as is).

G. ISSUES FOR DETERMINATION

[35] From the above, the following issues arise:

35.1 Whether respondent, in rendering a financial service to complainant, acted in a manner which was not in compliance with the FAIS Act and its subordinate legislation or acted negligently;

35.2 In the event it is found that respondent failed to comply with the FAIS Act and/or was negligent, whether this conduct caused the complainant to suffer damages or financial prejudice; and

35.3 The amount of such damages or financial prejudice.

The Investments

[36] On the basis of what complaint and respondent advanced, the following facts are not in dispute:

36.1 The source of the funds invested emanate from complainant's savings and bequests made to complainant. The investments were effected in the following manner:

- *Investment 1*

  Investment date: *31 July 2009*

  Product: *Class B Shares in Grey Haven 11 Riches Ltd (a subsidiary of Realcor)*

  Amount: *R 100 000.00*

Status of Investment: *Matured*

- *Investment 2*

Investment date: *15 April 2010*

Product: *Class B Shares in Iprobrite Ltd (a subsidiary of Realcor)*

Amount: *R 100 000.00*

Status: *Not matured*

- *Investment 3*

Investment date: *15 October 2010*

Product: *Iprobrite Ltd, a Realcor subsidiary*

Amount: *R 25 000.00*

Status: *Not matured*

Suitability of Advice

[37] At the core of respondent's defence is the explanation that the complainant "signed advice records in terms of section 8(4)(a) of the Code".

[38] Even after being called to specifically address this office on how respondent had complied with the provisions of the FAIS Act through a section 27 (4) notice, respondent appeared nonchalant about it and simply referred this

office to its response provided in terms of rule 6 (b), adopting a similar stance in relation to the second section 27 (4) notice.

[39] Section 8 (1) of the Code is prescriptive and states that a provider must, prior to providing a client with advice:

(a) take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

(b) conduct an analysis, for purposes of the advice, based on 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…

[40] Based on the response proffered, respondent seems to be oblivious to its legal responsibility arising out of section 8 (1) of the Code. Instead, respondent seems to believe that by having a pro-forma section 8 (4) advice record signed by complainant (without making the necessary enquiries) meets this legal responsibility. Alternatively that by having complainant's signature appended on the record exempts respondent from carrying out the necessary enquiries. This cannot be so. To allow this would go against the very basis upon which the FAIS Act was promulgated.

[41] Section 8 (4) of the Code, contemplates instances where, in spite of respondent's insistence to collect information from the complainant that would

enable respondent to conduct a needs analysis and risk profile (so as to provide advice that suits the personal circumstances of the complainant) complainant refuses to provide that information. It also contemplates situations where, based on the circumstances of a particular case, there is not sufficient time to conduct such analysis. By implication, section 8 (4) requires financial services providers (as a pre-requisite to rendering advice) to demonstrate the lengths to which respondent sought personal information to enable him to undertake this process. The respondent did not provide any detail to demonstrate that in respect of all three investments, circumstances were such that there was not reasonably sufficient time to conduct the analysis. On the documentation provided by respondent, alone, it does not appear that respondent took any steps to seek out this information. Needless to say respondent's defence (that the complainant signed the advice record) demonstrates respondent's contempt for the Act and the General Code.

[42] This is surprising given that the complaint in question bears a striking similarity to the complaint determined by this Office under case number FAIS 09071/10-11/MP 1- 'Carel Johannes Weideman and Anna Maria Jacomina Weideman v Huis van Oranje Beherend Beperk and Stephanus Johannes van der Walt'.

[43] It is worth noting that Weideman and Another v Huis van Oranje had not been resolved (as at September 2012) when the respondent was formally informed by this Office about the current complaint. At that stage it would have been clear to respondent that the matter would not be resolved informally; so a change of approach in responding to similar complaints ought to have been a logical consequence. However this was not so as respondent recorded the advice process (in an excerpt from the record in terms of section 8 (4)):

*"**Afdeling 4: Adviesrekord***

Opsomming van die inligting (bv Langternyn of kort-termyn finasiele behoefstes):

Daar is nie 'n onteleding van die finansiele posisie gedoen nie.

Die klient het self sy finansiele onteleding gedoen.

Klient se risiko profile (Bestaande beleggingsportefeulje ens.):

Die klient bestuur self sy beleggingsportefeaule" (underlining own emphasis).

(Copied as is)

[44] The above loosely translated, in so far as a needs analysis and risk profile are concerned, states that a needs analysis was not conducted and that the client conducted his own needs analysis. The risk profile ostensibly based on the clients existing investment portfolio simply states that the client himself managed his investment portfolio. Whatever the circumstances, however, each of the three sales concluded calls for an FSP to apply their mind to the complainant's circumstances at the time of concluding each sale.

[45] How this aspect of the advice record was completed is a replica of what was revealed in the Weideman and Another v Huis van Oranje complaint.

[46] That being the case, one would expect respondent to have taken note of the lessons from the Weideman and Another v Huis van Oranje, remedy any potential flaws in their advice process, particularly in relation to what appears to be a glaring disregard for its obligations under section 8(1) of the Code.

Alternately, one would have expected respondent to take the necessary steps to resolve this complaint with complainant in the informal resolution processes of this office.

[47] Based on the above and respondent's failure to demonstrate *how* and *what* steps it took to enable the complainant to understand the implications of not undertaking a needs analysis, I must infer that the above is a case of having not contemplated an analysis at all, rather than a case of respondent being prevented (through the actions of the complainant) from carrying out a needs analysis.

The risk inherent in the investments in Riches 9 and 11, Iprobite Ltd

[48] Having fully canvassed the risk inherent in Realcor investments through its subsidiaries in the determination issued in Weideman and Another v Huis van Oranje, I do not deem it necessary to reproduce the discussion. Moreover, in view of respondent's concession of having not conducted a needs analysis and understanding the risk profile of complainant, it is, as it has turned out, clear that the advice rendered by respondent failed to match complainant's personal circumstances.

[49] In another pertinent portion of the advice record, the following is revealed:

Transaksies wat oorweeg word

Beskrywing van transaksie	*Produk tipe en produk verskaffer*	*Kommentaar*
Elendom sindikasie	*Realcor Cape*	Opbrengs 15%
Elendom sindikasie	*PIC*	Opbrengs 12,5%
Elendom sindikasie	*Sharemax*	Opbrengs 12,5% to 30%

Table 1

Transaksies voorgestel en redes

Beskrywing van transaksie	*Produk tipe en produk verskaffer*	*Redes vir voorstel*
Elendom sindikasie	*Realcor Cape*	*Lewer die hoogdte opbrengs*
Elendom sindikasie	*PIC*	
Elendom sindikasie	*Sharemax*	

Table 2

(Copied as is)

Loosely translated into English, the tables above read as follows:

Transactions that are considered

Description of transaction	**Type of product/supplier**	**Comments**
Property Syndication	Realcor Cape	15% yield
Property Syndication	PIC	12,5% yield
Property Syndication	Sharemax	12,5 to 30% yield

Table 1

Transactions recommended and reasons

Description of transaction	Type of product/supplier	Reasons for suggestion
Property Syndication	Realcor Cape	Highest yield
Property Syndication	PIC	
Property Syndication	Sharemax	

Table 2

[50] In addition to the above reasoning and on the backdrop of the information contained in tables 1 and 2 above, it is inconceivable on what basis PIC and Sharemax (now also defunct property syndication scheme investments) were considered as suitable and comparable investments. I say so particularly against the backdrop of complainant's investment experience being confined only to listed investment houses where she would have had reasonable protection from the attendant governance arrangements.

[51] Complainant believed that she was investing in a hotel. This hotel was incomplete at the time that the investments were made (a fact that respondent was aware of and did not deny). It is not clear what steps respondent took to explain how the promised returns would be achieved. The unavoidable conclusion is that respondent had not conducted the necessary due diligence expected of an advisor in terms of section 2 of the Code and could not possibly have been acting in the interests of the complainant, when second and third respondents themselves did not comprehend the product that they were selling.

[52] Bearing the above in mind, had complainant been aware that second and third respondent would receive commission for a product that they did not

understand themselves, I have no doubt that complainant would not have invested in Realcor.

[53] It cannot therefore be denied that respondent caused the complainant's loss.

H. FINDINGS

[54] On the facts before me, second and third respondent failed to comply with the Act and the Code at the time of giving advice to complainant and were negligent in the following respects;

54.1 Respondent failed to comply with the duties of a financial adviser as contemplated by sections 2, and section 8(1) (a) (b) and (c) of the Code;

54.2 Respondent failed to act in the interests of complainant by recommending a highly risky investment in unlisted property syndication scheme when complainant's circumstances demonstrated they the product was not suitable.

54.3 Respondent failed to act honestly, fairly, with due care, skill, and diligence and in the integrity of the financial services industry by recommending an inappropriate financial product to complainant;

54.4 Respondent failed to elicit personal information from complainant, including her financial situation to show understanding of complainant's needs, prior to advising her;

54.5 Respondent failed to communicate with complainant honorably, professionally with due regard to the convenience of complainant as envisaged as by section 6 of the Code;

54.6 Respondent failed to provide an explanation of why Realcor investment was likely to satisfy complainant's identified needs and objectives as envisaged by section 9(1)(a) and (c) of the Code;

[55] I find that on the basis of the available evidence in the file respondents caused the loss complained of by complainant.

55.1 The loss complained of is causally connected to respondent's failure to abide by the Act and Code in advising Complainant to invest in Realcor.

55.2 Had respondent advised Complainant about the high risk nature of the investment product, its structure, funding model, lack of governance and possible director mismanagement, complainant would not have bought the investment.

55.3 I add that a candid statement from respondents that they had done no diligence as the Code demands, and that they knew nothing about the risks involved in Realcor would have seen complainant invest her capital elsewhere. None of this was done.

I. QUANTUM

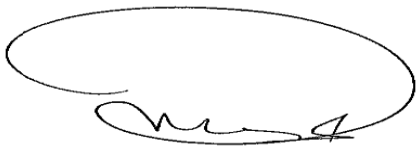
[56] Complainant has requested repayment of her investment capital in the amount of R125 000.00 in relation to the second and third investment.

J. ORDER

[57] In the premises the following order is made:

1. The complaint is upheld;
2. First, Second and Third respondents are ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the amount of R125 000; and
3. Interest thereon at the rate of 10.25% per annum effective seven (7) days from the date of this order, to date of final payment.

DATED AT PRETORIA ON THIS THE 12th DAY OF MAY 2016.



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