IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 12511/2013

In the matter between:

WILLEM HENDRIK VAN ZYL	**First Applicant**
DEON JOHANN PIENAAR	**Second Applicant**
And	
PRICEWATERHOUSECOOPERS INCORPORATED	**First Respondent**
LINDA MCPHAIL	**Second Respondent**
LOUIS STRYDOM	**Third Respondent**
TJAART HAMMAN	**Fourth Respondent**

JUDGMENT DELIVERED: TUESDAY, 07 OCTOBER 2014

SALDANHA, J

[1.] The applicants are both independent financial investment brokers, licensed and accredited with the Financial Services Board. They apparently sold investments to certain persons in the Blaauwberg Beach Hotel development which was developed by the Realcor Group (Realcor). The second, third and fourth respondents (collectively referred to as the respondents) were employed by the first respondent and were initially appointed as inspectors in terms of section 11 of the South African Reserve Bank Act No. 90 of 1989 into the affairs

of the Realcor Group and subsequently as managers in terms of section 84[1] of the Banks Act No. 94 of 1990. The applicants sought final declaratory relief against the respondents and an indemnification by them arising out of their appointments as managers in terms of the Banks Act which relief was couched in the Notice of Motion as follows:

"1. Declaring that the Respondents appointed as managers failed to act as envisaged in terms Section 84 of the Bank's Act, 1990;

2. Declaring the conduct and/or omission/s of the said Respondents to be unlawful and actions to be ultra vires;

3. Directing that as result of the Respondents action and/or omissions, applicants should not be held responsible for any loss sustained by any investor as a result of the Applicant marketing the investment whilst the Respondents were overall in change of the Realcor Group.

4. Further and/or alternative relief as the Honourable Court may deem fit;

5. Costs of this application."

[2.] In the founding affidavit of the first applicant (which was confirmed by the second applicant insofar as it related to him) the relief was formulated somewhat differently to that in the Notice of Motion as:

"16.1 Declaring that the failure of the manager so appointed by the South African Reserve Bank to act in terms of sections 81 to 84 of the Banks Act to be unlawful;

[1] *"Simultaneously with the issuing of a direction under section 83(1), or as soon thereafter as may be practicable, the Registrar shall by letter of appointment signed by him or her appoint a person (hereinafter in this section referred to as the manager) to manage and control the repayment of money in compliance with the direction by the person subject thereto."*

16.2 Declaring that the conduct of the said inspectors and later managers to be unlawful and ultra vires;

16.3 Declaring that any award made by the FAIS Ombudsman against the Declaring Applicants or any other broker for selling the investment to the member of the public within the Realcor Group, such award ought to be satisfied by the Respondents herein[2]."

[3.] During the course of argument counsel for the applicants proposed an amendment to the relief sought in respect of the indemnification to the effect that the respondents be held *"…no more than jointly liable for any loses sustained by the applicants who marketed the investments while the respondents were in charge of the Realcor Group.*"

[4.] The respondents opposed the application on both procedural and substantive grounds and moved that the application be dismissed with costs (inclusive of the costs attendant upon the employment of two counsel).

[5.] Briefly tabulated the procedural grounds on which the application is opposed are the following:

(i) The respondents contend that the application discloses no basis on which the relief can be granted as the applicants have failed to set out in the founding affidavit a cause of action and moreover no evidence sufficient to sustain the relief has been tendered. In this regard the respondents pointed to a lack of

---

[2.] First applicants Founding affidavit; paragraph 16, page 11 of the record.

clarity and consistency in respect of the basis for the relief in the founding affidavit; contradictory assertions made in the replying affidavit and new claims made against the respondents in a supplementary replying affidavit, which affidavit was also the subject of a striking out application by the respondents. The striking out application was aborted at the hearing after the applicants abandoned any reliance on the contents of the affidavit. The respondents also referred to what they described as the *"changing basis"* for the relief as contained in the Heads of Argument filed on behalf of the applicants and which was exacerbated and compounded by new and un-pleaded grounds for the relief during the course of oral argument. In this regard counsel for the respondents remarked that the applicants had literally resorted to a *"trial by ambush"* by having failed to make out their case in their founding papers.

(ii) The respondents contend that the applicants failed to establish that they or any one of them had the requisite standing to claim the relief sought and that the application was at best premature.

(iii) That the application was founded on both incorrect factual and legal premises'.

(iv) That the relief sought as formulated was both incoherent and incompetent.

(v) That the relief sought fell within the statutory limitation applicable to the respondents which excluded any liability for what was alleged and claimed by the applicants against the respondents.

[6.] In respect of the substantive basis of their opposition the respondents contended that insofar as final relief was sought by the applicants on motion, in line with **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**, at **634H-I,** the relief could not be granted as it was not justified on the facts alleged by the respondents considered together with those facts alleged in the applicant's founding affidavit which were admitted by the respondents.

Brief background.

[7.] On the 21st April 2008 the respondents were appointed as temporary inspectors by the Governor of the Reserve Bank in terms of section 11(3)[3] and 12[4] of the South African Reserve Bank Act No. 90 of 1989 in respect of Purple Rain Properties 15 (Pty) Ltd, trading as Realcor Cape; and/or Deonette de Ridder, a business woman who was the sole director of the Purple Rain Properties, and/or various other companies in what was referred to as the Realcor Group of Companies, and/or any related person or entity (including Midnight Storm Properties 386 (Pty) Ltd (MSI))[5]. In this judgment the group of companies and entities are collectively referred to as Realcor.

---

[3] "(3) Every inspector so appointed shall be furnished with a certificate stating that he has been appointed as an inspector under this Act.

[4] 12 Inspection of affairs of person, partnership, close corporation, company or other juristic person not registered as bank or mutual bank section

(1) If the Governor or a Deputy Governor has reason to suspect that any person, partnership, close corporation, company or other juristic person who or which is not registered in terms of the Banks Act, 1990 (Act 94 of 1990), as a bank or in terms of the Mutual Banks Act, 1993 (Act 124 of 1993), as a mutual bank, is carrying on the business of a bank or a mutual bank, he or she may direct the Registrar of Banks referred to in section 4 of the Banks Act, 1990, to cause the affairs or any part of the affairs of such person, partnership, close corporation, company or other juristic person to be inspected by an inspector appointed under section 11 (1), in order to establish whether or not the business of a bank or mutual bank, as the case may be, is being carried on by that person, partnership, close corporation, company or other juristic person.

(2) The provisions of sections 4, 5, 8 and 9 of the Inspection of Financial Institutions Act, 1984 (Act 38 of 1984), shall apply mutatis mutandis in respect of an inspection carried out in terms of subsection (1).

[5] See certificate of appointment of 3rd respondent, Annexure "LM11 to founding affidavit of 2nd respondent in second respondents answering affidavit Annexure 'AO3"

[8.] In the letters of appointment dated 24 April 2008[6] received by the second, third and fourth respondent from the Deputy Registrar of Banks they were informed that the Governor of the Reserve Bank had reason to suspect that Realcor was conducting the business of a bank in contravention of the provisions of the Banks Act and that the respondents were mandated to inspect the affairs of Realcor and to investigate and report on the suspected contravention.

[9.] In terms of the appointment they were vested with powers as set out in section 4[7] of The Inspection of Financial Institutions Act (Act No. 80 of 1998. They were also required to furnish the registrar with a written report as soon as possible on completion of their investigation.

[10.] Arising from the inspection conducted by the respondents and based on their report the Registrar of Banks concluded that Realcor had obtained money

---

[6] See letter of appointment of second respondent, second respondents answering affidavit Annexure 'OA'

[7] "*4 Powers of inspectors relating to institutions*

(1) In carrying out an inspection of the affairs of an institution under section 3 or 3A an inspector may-

(a) (i) summon any person who is or was a director, employee, partner, member, trustee or shareholder of the institution and whom the inspector believes is in possession of or has under his or her control, any document relating to the affairs of the institution, to lodge such document with the inspector or to appear at a time and place specified in the summons to be examined or to produce such document and to examine or, against the issue of a receipt, to retain any such document for as long as it may be required for purposes of the inspection or any legal or regulatory proceedings;

(ii) administer an oath or affirmation or otherwise examine any person who is or formerly was a director, employee, partner, member or shareholder of the institution;

[Para. (a) substituted by s. 149 (b) of Act 45 of 2013 .]

(b) at any time without prior notice enter and search any premises occupied by the institution and require the production of any document relating to the affairs of that institution;

(c) cause to be opened any strongroom, safe or other container in which he or she reasonably suspects any document of the institution is kept;

[Para. (c) substituted by s. 149 (c) of Act 45 of 2013 .]

(d) examine and make extracts from and copies of any document of the institution or, against the issue of a receipt, remove such document temporarily for that purpose;

(e) against the issue of a receipt, seize any document of the institution if the inspector is of the opinion that the document contains information relevant to the inspection;

[Para. (e) substituted by s. 149 (d) of Act 45 of 2013 .]

(f) retain any seized document for as long as it may be required for any criminal or other proceedings."

by conducting the business of a bank without being registered or authorized to do so under and in terms of the Banks Act.

[11.] On the 26th August 2008 the Reserve Bank issued a directive to De Ridder representing Realcor headed *"Directive pertaining to the repayment of funds issued by the Registrar of Banks in terms of section 83 of the Banks Act, 1990."* The relevant extract from the directive stated;

"34.1 Whereas as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No 90 of 1989,) the Registrar of Banks (the Registrar) is satisfied that Purple Rain Properties 15 (Pty) Ltd and/or Deonette de Ridder and/or Coral Lagoon Investments 233 (Pty) Ltd and/or Pearl Isle Trading 167 (Pty) Ltd and/or Majestic Silver Trading 167 (Pty) Ltd and/or Africa's Best 258 (Pty) Ltd and/or Africa's Best 25 Limited and/or Turquoise Moon Trading 125 (Pty) Limited and/or Midnight Storm Investments 386 (Pty) Limited and/or Realcor Cape and/or any related person or entity and/or all of them (hereinafter the one, the other, or all of them referred to as "the institution") have obtained money by conducting the business of a bank without being registered as a bank in terms of section 17 of the Banks Act, 1990 (Act No 94 of 1990- the Banks Act) or without being authorized, in terms of the provisions of section 18A(1) of the Banks Act, to carry on the business of a bank.

34.2 "now therefore, the institution is hereby directed, in terms of section 83(1), read with section 84, of the Banks Act, subject to and in accordance with the provisions set out in the schedule hereunder, to repay all monies so obtained by the institution from members and/or participants and/or "investors" under "the scheme" operated/conducted by the institution, in so far as such money has not

yet been repaid, including, if possible, any bank interest that may lawfully have accrued on such amounts."[8]

The scheme related to short term loans obtained by Realcor from members of the public as investments.

[12.] On the 26th August 2008 the Deputy Registrar appointed the second third and fourth respondents in terms of section 84(1) read together with section 83(1) of the Banks Act "*to manage and control the repayment by the institution of monies in compliance with the directive issued to the institution..."*[9] The duties of the respondents as managers were extensively set out in a schedule to the letter of appointment. They were also conferred with the powers under sections 4 and 5[10] of The Inspection of Financial Institutions Act 1998 (Act no. 60 of 1998).

---

[8] See letter dated 26 August 2006, second respondent's answering affidavit , Annexure 'OA5.'

[9] See letter dated 26 August 2006, second respondent's answering affidavit, Annexure 'OA6.'

[10] " *Powers of inspectors relating to other persons*

(1) In order to carry out an inspection of the affairs of an institution under section 3 or 3A an inspector may-

(a) (i) summon any person, if the inspector has reason to believe that such person may be able to provide information relating to the affairs of the institution or whom the inspector reasonably believes is in possession of, or has under control, any document relating to the affairs of the institution, to lodge such document with the inspector or to appear at a time and place specified in the summons to be examined or to produce such document and to examine, or against the issue of a receipt, to retain any such document for as long as it may be required for purposes of the inspection or any legal or regulatory proceedings;

(ii) administer an oath or affirmation or otherwise examine any person referred to in subparagraph (i);

[Para. (a) substituted by s. 150 (b) of Act 45 of 2013 .]

(b) on the authority of a warrant, at any time without prior notice-

(i) enter any premises and require the production of any document relating to the affairs of the institution;

(ii) enter and search any premises for any documents relating to the affairs of the institution;

(iii) open any strongroom, safe or other container which he or she suspects contains any document relating to the affairs of the institution;

(iv) examine, make extracts from and copy any document relating to the affairs of the institution or, against the issue of a receipt, remove such document temporarily for that purpose;

(v) against the issue of a receipt, seize any document of the institution relating to the affairs of the institution if the inspector is of the opinion that the item contains information relevant to the inspection;

[Sub-para. (v) substituted by s. 150 (c) of Act 45 of 2013 .]

(vi) retain any seized document for as long as it may be required for criminal or other proceedings,

but an inspector may proceed without a warrant, if the person in control of any premises consents to the actions contemplated in this paragraph.

[Sub-s. (1) amended by s. 150 (a) of Act 45 of 2013 .]"

(2) (a) A warrant contemplated in subsection (1) (b) may be issued, on application of an inspector, by a judge or magistrate who has jurisdiction in the area where the premises in question is located.

[13.] In terms of their appointment the respondents were to hold office until such time as there had been full compliance with the directive but the Registrar could in writing withdraw the appointment of a manager on good cause shown whereupon the manager was required to vacate his or her office.

The complaints of the applicants.

[14.] The applicants listed a myriad of complaints in support of the relief that they sought. Some of the complaints related to the Registrar of the South African Reserve Bank (SARB) while others should more appropriately have been raised against the directors of Realcor and probably also their legal representatives. None of them were joined to the proceedings.

[15.] The applicants contended that the basis of the application was *"rooted"*[11] in a ruling of the FAIS Ombudsman that had been made against a fellow broker who had also sold Realcor investments to a member of the public. The investor obtained an order against the broker in terms of which the broker was obliged to repay to the investor the value of his entire investment made together with interest. The applicants claimed that the basis of the Ombudsman finding was that broker was negligent for not having performed the necessary investigations and for not having conducted a due diligence of the Realcor Group prior to selling

---

(b) Such a warrant may only be issued if it appears from information under oath that there is reason to believe that a document relating to the affairs of the institution being inspected, is kept at the premises concerned.
(3) Any person whose document has been removed or retained, or from whom a document has been seized, under subsection (1) (a) or (b) or his or her authorized representative, may examine and copy such document and make extracts therefrom under the supervision of the registrar or an inspector during normal office hours."

[11] First applicant's founding affidavit, paragraph 12, page 9.

the investments to members of the public and was therefore found liable to repay the investment, more especially since Realcor had been finally liquidated and there was no prospect of the investor receiving a return on his investment. The FAIS Ombud declared the risk profile of the investment as high as opposed to moderate conservative. The applicants contended that the finding against the broker by FAIS was wrong as the investment products sold by the brokers in Realcor to members of the public were sold while the respondents were the managers of Realcor and who effectively were in charge of the companies; that the respondents vetted and approved each of the investment tools used and in addition had overseen the flow of funds in and out of the banking accounts of the companies and moreover they had approved the commissions paid to them. The applicants explained that investments in Realcor which were sold prior to the appointment of the respondents were repaid to investors after the respondents were appointed but that investments that related to a 12 month debenture scheme sold by brokers after the appointment of the respondents were now the subject matter of complaints to the FAIS Ombudsman. That, they claimed, placed them and their businesses at risk. The first applicant claimed that clients with whom he had established a business relationship had terminated all business dealings with him as a result of the investments in Realcor having turned sour. He claimed that the cancellations had a direct effect upon them as investment brokers through no fault of their own.

[16.] The applicants claimed that as a result of the respondents' failure to act in terms of the Banks Act all related companies in Realcor were liquidated and the

main asset, the hotel, had been sold. A consequence, they claimed, was that investors were at risk of losing their entire investments.

[17.] The applicants explained that Realcor Cape (Pty) Ltd through its subsidiary company, Midnight Storm Investments 386 Ltd (MSI), a property development company, had sought to develop the five star hotel in Table View with *"the man in the street"*[12] as shareholders. The funding of this development they claimed was to be obtained through the sale of shares as provided for in the Companies Act No. 61 of 1973 and with the issue of debenture notes. Realcor, they claimed, depended upon investments made by ordinary members of the public with the view that such members would in the end be the shareholders (owners) of *"a five star, green hotel being managed by the international Radisson Hotel Group in terms of a signed fifteen year management agreement."*[13] The applicants (and other brokers) had been approached by the Realcor Group to market the product to the public in consideration for commission. They claimed that their attempts to achieve this goal for the benefit of ordinary members of the public in the Realcor group was *"thwarted by the unilateral actions of the respondents"*[14] which actions they claimed were *"in direct conflict with the prevailing laws and policies of the South African Reserve Bank at the time."*[15]

[18.] The applicants explained that MSI obtained monies from members of the public through public investment companies through the issue of prospectuses

[12] First applicant's founding affidavit para 22, page 16
[13] First applicants founding affidavit para 23 , page 17
[14] First applicant's founding affidavit para 24, page 17

which were distributed publicly. The public investment companies were Grey Haven Riches 9 Limited, Gray Haven Riches 11 Limited and Iprobrite Limited. Funds collected by those companies were invested in MSI for the construction of the hotel. MSI never obtained monies directly from the public.

[19.] The applicants claimed that up until the 26th August 2008 (the date of the appointment of the respondents as managers) Realcor was managed by a board of directors comprising de Ridder and Mr Wimpie Nortje. They claimed that the position changed on the 26th August 2008 in terms of sec 84(1) the Banks Act when the appointment of the managers took effect and whereupon the respondents took *"control of the entire company, its assets and managed the flow of funds as provided for in the Banks Act 1990 and other legislation."*[16]

[20.] The applicants claimed that in terms of sections 81 to 85 of the Banks Act the management of the company, which included *"the flow of funds,"* in and out of Realcor was in the hands of the respondents as the appointed managers. They claimed that section 84(1)(A)[17] of the Banks Act *"was analogous to the provisions of the Insolvency Act No 24 of 1936 as it divested the directors of control of the company*"[18] and vested control in the hands of the respondents. The applicant's claimed that the *"managers stood in the position above that of*

---

[15] First applicant's founding affidavit para 24, page17.
[16] First applicant's founding affidavit para 32, page 22.
[17] "The manager shall as soon as may be practicable report to the Registrar whether or not the person subject to the relevant direction is, in the manager's opinion, solvent, and if the manager finds that the person subject to the direction is insolvent, the manager shall comment on whether such person is technically or legally insolvent."
[18] First applicant's founding affidavit paragraph 38, page 24.

directors of the company as all actions were stayed against the company save with the knowledge of the SARB (it's appointed managers…"[19]

[21.] The applicants further complained that they had been unaware of any finding by the South African Reserve Bank of, *"MSI being part of an illegal deposit taking scheme."*[20] They claimed their view was reinforced by the fact that no court application (to the best of their knowledge) had been launched by the SARB against MSI for an order prohibiting such *"prevailing and or anticipated behavior by SARB against MSI."*[21] They claimed that the absence of any court application to prevent any anticipated illegal taking of monies from members of the public was *"unequivocal proof"*[22] that the raising of money from members of the public in the manner conducted by the Realcor Group *"was in fact not illegal."*[23]

[22.] The applicants claimed that upon the receipt of the report by the SARB from the inspectors and having considered same the Registrar appointed the respondents as managers without *"seeing the need to apply to this honourable court for an order to prohibit the continued illegal activity."*[24] They noted however that the provisions of section 81[25] of the Banks Act (with regard to the Registrar

---

[19] First applicant's founding affidavit para 39, page 25.
[20] First applicant's founding affidavit paragraph 44, page 26.
[21] Ibid, para 44, page 26
[22] First applicant's founding affidavit, para 44 page 26.
[23] First applicants founding affidavit para 44 page 26.
[24] First applicant's founding affidavit para 45, page 26.
[25] *"**Section 81 (1)***
If the Registrar has reason to suspect that any person who is not registered as a bank in terms of this Act-
(a) is likely to conduct the business of a bank in contravention of the provisions of section 11 (1) or 18A (6); or

applying to a court for an appropriate order) were not peremptory and afforded the SARB a discretionary power to do so.

[23.] In respect of the processes followed by the South African Reserve Bank with regard to Realcor they noted that the report which led to the appointment of the respondents on the 26th August 2008 was never published nor had it given to Realcor and had not been placed before a competent court.

[24.] They noted further that no application for the liquidation of MSI was launched by the respondents or the SARB from which they deduced that *"the respondents had found no evidence that MSI under directive was either technically or legally insolvent as at August 2008 or very soon thereafter."*[26] They added further that inasmuch as the respondents were *"de jure"* in charge of Realcor including MSI and while the companies were under their management it became insolvent with a final order for the liquidation of the Realcor Group obtained on the 28th August 2012, almost four years after the appointment of the respondents.

[25.] The applicants contended that it was incumbent upon the respondents in terms of the Banks Act *"to take into their possession and control all assets, books*

(b) has so contravened the provisions of section 11 (1) or 18A (6) or has contravened the provisions of section 22 (4) or (5), or that such a contravention is likely to be continued or repeated,
the Registrar may apply to a division of the Supreme Court having jurisdiction (hereinafter in this section referred to as the court) for an order-
(i) prohibiting the anticipated contravention referred to in paragraph (a);
(ii) prohibiting the continuation or repetition of a contravention referred to in paragraph (b); or
(iii) prohibiting the person concerned from disposing of or otherwise dealing with any of his or its assets while the contravention suspected of having been committed or of being continued is investigated."

of accounts, share registers, records of debenture holders, etc. and that same would be scrutinized before any action/s are implemented.[27]*"* They claimed that the role of the respondents was not limited to the mere identification of the persons who made investments and to embark on a repayment plan but that they had at the same time to *"oversee the flow of funds.*[28]*"* This obligation they claimed presupposed that the respondents, *"being qualified auditors,*[29]*"* had to oversee the flow of funds into and out of the companies banking accounts and that they were in fact in charge of all the finances of Realcor.

[26.] The applicants claimed that at no stage were they, as the investment brokers who sold the investments to members of the public, presented with any documentary evidence and/or informed on what basis the Registrar of SARB had found that MSI had conducted the business of a bank in contravention of the Banks Act. They claimed that to the best of their knowledge it *"cannot be asserted that MSI acted as a bank because the natural corollary of obtaining money is also borrowing, furnishing credit facilities to members of the public. This renders the SARB's assertion of MSI conducting the business of a bank as being hollow.*[30]*"*

[27.] The applicants also claimed that the respondents had a duty to keep the brokers (insofar as the investments were secured by them) and/or investing

---

[26] First applicant's founding affidavit para 50, page 30.
[27] First applicant's founding affidavit para 57, page 32.
[28] First applicant's founding affidavit para 57, page 32.
[29] First applicant's founding affidavit para 58, page 32.
[30] First applicant's founding affidavit para 61, page 33.

public apprised of their involvement in the Realcor group and recorded that the only correspondence they received as brokers from the respondents was during November 2010 more than two years after their appointment as managers; in which they were informed of the investigation by the Registrar of SARB.[31]

[28.] The applicants also claimed that the *"initial finding that MSI was conducting the business of a bank while not being registered as such is baseless and without substance.[32]"* They contended that having made such a finding the SARB *"was not receptive to any other information which could prove the contrary. The fact that the SARB did not disclose the inspectors report to MSI is indicative of the stance adopted by SARB.[33]"*

[29.] The applicants stated that as at the 9th June 2009 the monies collected in terms of the unlawful loan agreements were repaid to the body of investors and in this regard referred to an email from a Mr Wimpie Nortje, the marketing director of Realcor, to a Mr Pieter Muir (a Senior Property Investment Consultant) in which he thanked the consultants and brokers for their co-operation in the conversion process of the loans to debentures. The applicants contended that the respondents had at that stage thus given effect to the terms of their letter of appointment and *"at that stage, fulfilled their task for which they were appointed, the natural consequence would have been that their mandate has been fulfilled*

---

[31] Email dated 3 November 2010 from first respondent to "*Brokers representing 12 month Debenture Holders in Grey Haven Riches 9 and Grey Haven Riches 11."*
[32] First applicant's founding affidavit, para 63 page 34.
[33] First applicant's founding affidavit, ibid.

and the directive ought to have been withdrawn. This however did not take place.[34]"

[30.] They claimed that the Registrar of the SARB did not withdraw the directive and neither did the respondents vacate the offices of Realcor and allow the company to continue with its business as usual. They claimed that the respondents remained in charge and continued trading with company money, the assets and authorized the continued sale of investments, the payments for supplies and to contractors who were *"steadily completing the hotel.[35]"*

[31.] The applicants claimed that upon the investors being repaid and *"having been informed that the loan agreement was contrary to the provisions of the Banks Act many an investment broker, like myself were contacted by the investor for reasons which included; the re-investment of their money, answering questions of the return they had received, been instructed to look at ways to re-invest as they did receive a good return on their investment made with Realcor.*[36]

[32.] The applicants claimed further that *"many investors reinvested their money upon redemption of the twelve month loans which were found to be in contravention of the Banks Act"*[37] and that such investments were made in terms of a Prospectus which had been approved by CIPRO prior to the applicants marketing the investments. This they contended also ensured that the

[34] First applicants founding affidavit para 68, page 36.
[35] First applicant's founding affidavit para 69, page 36-37
[36] First applicant's founding affidavit para 70, page 37.

investments carried the approval of the Financial Services Board who protected members of the public. In respect of the debentures referred to in the Prospectus they referred to the various correspondence between the then attorney of Realcor Mr Mario Laubscher of Heunis & Heunis, to the fourth respondent who, the applicants claimed, was to have ensured that the redrafted Prospectus was brought onto "*a legal footing"*[38] and claimed that the twelve month debentures *"as an investment tool was vetted and approved by the appointed managers."*[39] I will deal with these contentions in greater detail when setting out the respondents' version.

[33.] The applicants contended that as *"a reasonable investment broker"*[40] they felt comfortable and assured that the investments made by their clients were "*safe in that the SARB and the respondents were in charge of the company, any form of illegality which could present itself was removed any risk which the investor might have had been minimized, and that further construction of the asset (the Hotel) was continuing, the SARB and its managers (the respondents herein) were in charge of the flow of funds i.e. incoming and outgoing funds."*[41]

[34.] The applicants claimed that *"a year later on the 2nd September 2009 after many investments had already been made in terms of the twelve month debenture agreements were sold an email under the hand of the second*

---

[37] First applicant's founding affidavit, para 70, page 37.
[38] First applicant's founding affidavit para 71, page 37.
[39] First applicants founding affidavit .para 72, page 38.
[40] First applicant's founding affidavit para 89 page 43.
[41] First applicant's founding affidavit para 89, page 43.

respondent was sent out which pronounced that the twelve month debenture agreement as an investment tool was also in conflict with the Banks Act." They claimed that no reason for this alleged irregularity was ever given nor was there any order of court which declared the sale of the investment tool to be in conflict with the provisions of the Banks Act.[42] They claimed that the basis for such decision appeared to them to be that the second respondent "*was unaware thereof and she did not approve the sale of the 12 month debentures. This unawareness and lack of approval is further evidence, in my view, of the managers being in a position above that of the directors."*

[35.] The applicants contend that the conduct of the respondents was *"highly peculiar it seems to be sinister in that a year had passed since a appointed manager Hammond (the fourth respondent) who was at the time also employed by the first respondent had sight of the twelve month debentures as an investment tool and had raised no objection to it being used as an investment tool."* [43]

[36.] The applicants contended that the respondents had at no stage prior to their raising the illegality of the twelve month debentures mentioned the existence of Commercial Paper Notice No. 2172[44] Government Gazette No.

---

[42] First applicants founding affidavit para 90 page 43
[43] First applicants founding affidavit para 91 page 44
[44] *"commercial paper" means -*
(a) any written acknowledgement of debt irrespective of whether the maturity thereof is fixed or based on a notice period, and irrespective of whether the rate at which interest is payable in respect of the debt in question is a fixed or floating rate; and
(b) debentures or any interest-bearing written acknowledgement of debt issued for a fixed term in accordance with the provisions of the Companies Act, 1973 (Act No. 61 of 1973),

16167 dated 14 December 1994. They claimed that what they found *"more frightening"*[45] was that the respondents had either not known about its contents and consequences or they had intentionally elected to remain silent about it to the detriment of the investing public and had at no stage informed the investor about it. The applicants contended that they did not believe that the respondents had not known about the existence of the Commercial Paper, its conditions or effects as they were highly qualified forensic auditors contracted by the SARB to perform various tasks within the financial services sector and they ought to have been fully apprised of all laws, regulations or directives relating thereto. They claim that this non-disclosure had a material impact on them and the relationship which they established over many years with members of the public and had impacted on their credibility as brokers of repute. They further claimed that the respondents *"should not have allowed the investing public to re-invest their monies on three different occasions, each time with the use of a different investment tool."*[46] They claimed that the respondents ought to have stopped any further investments when they took office on the 26th August 2008 more especially since the monies collected in terms of the twelve month loan agreements had been repaid.

[37.] The applicants contended that should one accept that the scheme was an unlawful deposit-taking scheme, the natural consequence flowing therefrom would have been the restoration to the investors of the monies unlawfully

---

but does not include bankers' acceptances;
[45] First applicant's founding affidavit para 94, page 45.
[46] First applicant's founding affidavit para 95 page 45.

obtained. Applicants claimed though *"it seemed that in the whole process of managing Realcor under directive and management of the respondents the restoration of money to the investor has simply been ignored."*[47] They also claimed that inasmuch as the Registrar of SARB was entrusted with a supervisory role in protecting the public at large the *"motives of the SARB so stepping in is surely questionable. To date no account has been rendered to the investors as to where their money ended up. This further raises the question as to the legitimacy of the SARB stepping in."*[48]

[38.] The applicants also referred to a loan from Wesbank which had been obtained by the directors of Realcor allegedly, without the knowledge and consent of the respondents. The applicants claimed that inasmuch as it was the duty of the respondents to have overseen the flow of funds, the respondents must have been aware of the loan *"but elected to remain silent as once the funds was in the companies banking account they could access same to ensure that their account* (the respondents') *be paid."*[49]

[39.] The applicants claimed that as the hotel neared completion the Deputy Registrar of the SARB on the 15th October 2010 issued a public statement via "Moneyweb" in which he stated that the Realcor Group was involved in illegal activity, the net result of which was that *"many an investor who had acquired*

[47] First applicant's founding affidavit para 99, page 46.
[48] Ibid
[49] First applicant's founding affidavit para 104, page 48.

shares and debentures wanted to withdraw their money from this scheme."[50] Applicants claimed that Realcor could not meet its financial obligations and on advice received issued an application to rescue the business in terms of the Companies Act.

[40.] The applicants claimed that had they been aware of any illegality in the investment tools (the twelve month debentures as issued) at the time the company was managed by the respondents they *"would not have marketed theses investment products."*[51] They further claimed that the respondents were enriched and had received a financial reward (ostensibly with regard to the fees that they had earned) in their capacities as the managers from August 2008 which payments were made by the companies that they were managing in terms of the Banks Act.

[41.] The applicants also contended that for all of these reasons that they were entitled to be indemnified for any losses which they may sustain as a result of any investors seeking redress against them. They also claimed that any claim which they may have against the respondents *"could become prescribed and further it would motivate the FAIS Ombudsman to fully investigate the happenings and circumstances surrounding the Realcor Group prior to making a finding if any at all."*[52]

---

[50] First applicant's founding affidavit para 109, page 50.
[51] First applicant's founding affidavit para 116, page 52.

[42.] The applicants claimed that the *"SARB and its managers had been acting in a cavalier nonchalant manner towards the investing public under the pretext that they were acting in the interest of the investing public."*[53] They claimed that the prejudice and harm suffered by the investing public as a result of the conduct of the SARB and its managers was *"astronomical, the true extent of the prejudice suffered by the investing public at this stage is too difficult to comprehend and calculate."*[54] They further claimed that on the application being successfully finalized, the court should also consider *"an amount of damage (sic) for damages which was sustained by the investing public."*[55]

[43.] In their replying affidavits the applicants raised further complaints against the respondents which necessitated the latter filing a further answering affidavit to refute the allegations, in particular those to the effect that the respondents through their control over Realcor had misappropriated monies, as being unfounded, untrue and denied. The applicants had also contended that the second respondent had misrepresented to the court the facts with regard to her and the other respondents' prior knowledge of the Wesbank loan to Realcor. The second respondent clarified the position and explained that inasmuch as the Wesbank loan had been brought to their attention it was only done after the loan had been approved and the monies expended. Inasmuch as the applicants implied dishonesty on the part of the respondents they placed on record that such allegations were manifestly untrue and were denied.

---

[52] First applicant's founding affidavit para 120, page 53.
[53] First applicant's founding affidavit para 123, page 54.
[54] First applicant's founding affidavit para 124, page 54.

[44.] The applicants filed a further affidavit in reply to the respondents' supplementary affidavit. The contents of the reply was the subject of the aborted striking out application wherein the respondents claimed that averments made by the applicants were of a hearsay nature, irrelevant, vexatious and defamatory of them.

The Respondents' version

[45.] In their narrative as to how they exercised their functions and duties under the Banks Act in relation to Realcor the respondents conveniently distinguished between, and dealt separately with, three different periods during their appointment. The first period commenced from the date of their appointment on 21 April 2008 until September 2009. The second period extended to early February 2011. The third period followed thereafter until their appointment was withdrawn upon the liquidation of the entities in Realcor.

First Period.

[46.] During the period of their appointment as temporary inspectors the respondents explained that they met with and held various discussions with the managing and controlling director of the companies within Realcor, Ms de Ridder, in particular, with regard to the manner and method in which finance had been raised by the companies in Realcor from members of the public. The respondents contended that at all material times during the inspection process, the directors and de Ridder, in particular, retained control, administration and

[55] First applicant's founding affidavit para 125, page 54.

operation over all of the companies within Realcor and the various business activities conducted by them. The respondents denied that they, either as inspectors or managers, controlled, directed or managed (the day to day affairs) of any of the companies in Realcor.

[47.] The respondents claimed that in order to minimize any disruption within the businesses of Realcor they refrained from removing any documentation from the company's premises and had merely made copies of documents they considered necessary for the purposes of their inspection. The documents related to the short term loans made by members of the public to the various entities in Realcor which they suspected at the time may have been viewed by the Reserve Bank as constituting the business of a bank in contravention of the Bank's Act. They emphatically stated that at no stage had they conducted a forensic audit or any audit in terms of international auditing standards and that at no stage did they express an audit opinion in relation to the finances and the affairs of the Realcor companies and claimed that they were neither mandated nor instructed by the Registrar of SARB to do any such audit.

[48.] The respondents claimed that in their capacity as inspectors they had not given any advice to Realcor nor to any of the directors thereof with regard to the conduct of the business, its administration or any other activity related to the affairs or the businesses of Realcor and its various companies. They claimed that it was not within their mandate under the directive and it was not within the terms of their appointment by the Registrar and that they at all times performed

their functions and responsibilities strictly in accordance with the letters of appointment.

[49.] The respondents claimed that as managers they were principally mandated to manage and control the repayment by Realcor of all the monies obtained from members of the public, participants and/or investors in the unlawful investment schemes operated and conducted by the companies in Realcor. They contended that theirs was a limited function that was confined to their efforts and interactions in managing and controlling the repayment process in terms of the directive and the provisions of the Banks Act.

[50.] In contrast to the claims made by the applicants in their founding papers the respondents stated that they had not:

(i) taken control of any company within Realcor;

(ii) replaced and substituted themselves in the stead of the directors and or as corporate controllers of Realcor;

(iii) performed the functions and duties of Directors or corporate controllers;

(iv) managed the companies, their affairs or the business conducted by them;

(v) managed or controlled the finances or assets.

These duties, functions and authorities they maintained remained vested in and continued to be performed by the directors of the companies within Realcor and in particular by de Ridder.

[51.] In their analysis during 2008 of the amounts received by Realcor they explained that it appeared to them that a total amount of R291,311,379,90 was allocated to various development schemes which had been raised from 1,941 investors.

[52.] The respondents pointed out that Realcor, represented by de Ridder, was at all times legally represented and had not challenged the directive nor the appointment of the respondents and accepted the obligation to repay and *"undertook to us as managers both to desist from doing so any further in the future* [a reference to contravention of the Banks Act] *and to make arrangements to repay these monies in question to the investors in question."*[56]

[53.] The respondents stated that they had put into place a system to oversee the repayment of the amounts to investors through the appointment of a Mr Rushdie Solomons, an employee of the first respondent. Solomons attended upon the officers of Realcor on a weekly basis to verify the short term loan repayments and reported to the managers. The second, third and fourth respondents were physically based in Pretoria and had travelled to Cape Town for meetings with de Ridder and other representatives of Realcor as and when it was necessary. They explained that during the course of their engagements with Realcor and de Ridder in particular, they (Realcor and de Ridder) were represented by an attorney Mr Mario Laubscher, who they claimed had often participated in the meetings and with whom the majority of their correspondence

was exchanged with. The respondent claimed that there had been extensive meetings and exchanges of communications between themselves as managers and the management of Realcor represented by Laubscher relating to how and from what sources Realcor would repay the monies to investors in terms of the SARB directive.

[54.] The respondents claimed that on the 2nd September 2009 it came to their attention for the first time that Realcor had been marketing on its website *"fixed term 12 month debentures in Grey Haven Riches 9 (Pty) Ltd (GHR9), a company in Realcor being an investment company in Realcor raising funds for the construction of the Hotel by MSI."*[57] The respondents claimed that they had not been aware of the twelve month debentures described on the website as neither Laubscher nor any of Realcor's representative had ever brought it to their attention nor were the debentures referred to or disclosed in the Prospectus of GHR9 with which they had originally been furnished approximately a year earlier.

[55.] Insofar as the engagement between the respondents and the legal representatives of Realcor is the subject of much contention in these proceedings it is perhaps necessary to set it out with some detail. (i) The respondents claimed that on the 4th September 2008 Laubscher had sent an email to the fourth respondent and attached a copy of the GHR9 Prospectus approved by the Registrar of Companies. The email also made reference to the conversion of the remaining loans in MSI to shares in GHR9. Laubscher stated

[56] Second respondents answering affidavit para 46, page 177.

that Realcor welcomed the fourth respondent's opinion that the conversion of the options were in order. (ii) In response, the fourth respondent on the same date requested further information such as; a copy of the registered Prospectus; a copy of the loan agreements with the option to purchase shares contained in the Prospectus and confirmation that the agreement referred to was standard to all investors and that there were no deviations; a list of investors in electronic format and details of whether the offer in terms of the Prospectus was made first to option holders and then to members of the public and the dates relevant to such offers. (iii) On the 8th September 2008 the respondents received per courier from Laubscher a further copy of the GHR9 Prospectus, this one dated the 11th July 2008, completed and with annexures. The copy of the Prospectus and the annexures contained no reference whatsoever to twelve month debentures. (iv) On the 9th September 2008, Laubscher emailed the fourth respondent and again made no reference whatsoever to fixed term debentures.

[56.] Respondents claimed that the matter rested there for a number of months. (v) On the 9th June 2009 the respondents claimed that they received yet a further copy of the GHR9 Prospectus, now dated 28th April 2009. It was couriered by a Mr Kobus Stone of Realcor to a Ms Lily Moruri of the first respondent in response to her request for an additional copy of the Prospectus. The GHR9 Prospectus received on the 9th June 2009 contained references to debentures, with added details relevant to the debentures. The amendment and/or the supplement which had added details relevant to the debentures was not disclosed to the manager

[57] Second respondent's answering affidavit para 53, page 179.

and were not noted. (vi) At a meeting with the respondents on the 2nd September 2009, Laubscher handed yet a further copy of the GHR9 Prospectus, dated the 11th July 2008 to the second respondent. The second respondent claimed that while this version of the Prospectus while dated the same date as the one received on the 4th September 2008 it included an addendum that contained reference to the debentures. She claimed that she only noticed the reference to the debentures on the evening of the 2nd September 2009 and claimed that her attention had not been directed to this important variation by either Realcor's representatives or for that matter by Laubscher. (vii) On the 8th September 2009 the second respondent accompanied by attorney, Neels Alant of Hahn & Hahn Attorneys, who represented the respondents, met with Laubscher at Realcor's head office in Grabouw where the following was placed on record;

(a) that the respondents had not been made aware of variations or additions to the GHR9 Prospectus, particularly insofar as those variations or additions related to the marketing of a second class of twelve month debentures as detailed in the supplement to the Prospectus which had been lodged with the Registrar of Companies during September 2008 without their knowledge; and

(b) Realcor was advised that the twelve month debentures were in contravention of the Banks Act and did not meet the requirements of the Commercial Paper Notice 2172 dated 14 December 1994. A copy of the Notice was sent to Laubscher after the meeting.

(c) The second respondent claimed that at the meeting there was a discussion as to whether the short term twelve month debentures which had been issued and sold to investors and from which the monies received were

utilized to repay investors under the initial directive complied with any of the exclusions created by paragraph (cc) of the definition of *"business of a bank*" as defined in section 1[58] of the Banks Act and specifically whether it complied with the Commercial Paper Notice. Alant advised that since no attempt had been made to comply with the Notice, any attempt to create some form of constructive compliance would not have remedied the legal short comings in the funding model. The exceptions were therefore not applicable. (viii) In the face of the aforegoing Realcor represented by de Ridder and Laubscher undertook: (aa) to stop marketing and/or selling fixed term debentures with immediate effect and to provide the respondents with written confirmation thereof. (bb) to remove all reference to the fixed term debentures from Realcor's website with immediate effect (and they undertook to provide the respondents with written confirmation thereof; and (cc) to provide the respondents by the 17th September 2009 with detailed documents setting out the manner in which Realcor intended to address or remedy the situation which had arisen. (ix) The matters addressed at the meeting were confirmed in an email dated 9th September 2009 by the respondents to Heunis & Heunis and de Ridder. The respondents also requested a detailed schedule of the twelve month debenture holders, and a table reflecting each person's name and the amount invested. (x) In a letter dated 10 September 2009 from Heunis & Heunis, Realcor undertook not to continue with the marketing of debentures identified during the meeting. Realcor

---

[58] *"the business of a bank" means- "…but does not include…*

…

(cc) any activity of a public sector, governmental or other institution, or of any person of category of persons, designated by the Registrar, with the approval of the Minister, by notice in the Gazette, provided such activity is performed in accordance with such conditions as the Registrar may with the approval of the Minister determine in the relevant notice;"

however alleged that they had provided the respondents with several copies of the Prospectus which they used to market the debentures and relied on the fact that the Prospectus was approved by the Registrar of Companies. (xi) The respondents in a letter dated 11 September 2009 referred to the misleading manner in which the Prospectus of GHR9 had been provided by Realcor to them and added that the mere fact that the Prospectus had been registered with the Registrar of Companies did not exempt Realcor from complying with the Banks Act and reserved their rights in the light of the *"apparent misrepresentations"*[59] that were made regarding the inclusions of the second class of debentures in the GHR9 Prospectus. They recorded that they had never endorsed nor approved the soliciting of funds through debentures in terms of the amended Prospectus. (xii) Laubscher in a response dated 17 September 2009 denied that Realcor had made any misrepresentations regarding the inclusion of the second class of debentures in the GHR9 Prospectus and contended that the principle of disclosure as they understood it in the context of the Companies Act required registration of the Prospectus with the Registrar of Companies. He referred to the representations made to the fourth respondent on the 3rd July 2009 by Realcor in terms of which the option to purchase shares in GHR9 was disclosed and the fact that the respondents as inspectors had not raised any query relevant to Realcor's intention to sell shares in terms of the public offer. (xiii) The respondents pointed out that the correspondence of the 3rd July 2009 made no reference to the twelve month debentures. (ivx) Laubscher thereafter made reference to the fact that the respondents had never objected to the shares and

[59] Second respondent's answering affidavit para 68.2, page 183

debentures in terms of the Companies Act. The respondents maintained that the Prospectus which they had been provided with and which they considered made no reference to *"fixed term debentures."*[60] Moreover Laubscher had acknowledged that the supplement to the Prospectus in which reference was made to the *"fixed term debentures"*[61] was registered on the 30th September 2008 and was not provided to the fourth respondent (the supplement was not registered at the time that the Prospectus was provided to the fourth respondent).

[57.] The respondents also referred to a letter dated 7 October 2010 by Mr Herman S Viljoen (Viljoen), a financial consultant employed by Realcor and de Ridder to assist in the administration of Realcor and in the conduct of its business activities and also with regard to the management of the companies by the respondent, where Viljoen claimed that Realcor distanced itself from the comments/allegations of Laubscher and acknowledged the unlawfulness of its conduct by stating; *"After two years since these prospectuses in Gray Haven 9 and Grey Haven 11 were issued, registered at CIPRO and approximately R326 million worth of one year debentures were obtained, PWC noted that they had not been previously aware of this new prospectus which is again an illegal instrument as according to SARB notice number 2172 issued on the 14th December 1994 the issue of debentures for less than a five year period were still in contravention of the SARB Act. Realcor again took this up with his professional advisors, Heunis & Heunis Attorneys, who admitted that they in fact used an older, incorrect SARB notice issued instead of the one above. There*

[60] Second respondents answering affidavit para 69.3, page 184.

(sic) services were subsequently terminated and new attorneys, AJ Coetzee & Associates were appointed during January 2010…. Realcor again commenced with the process of paying these 'illegal instruments' since 1 September 2009." (xiii) On the 30th September 2009 the respondents emailed Realcor to follow up on the request for information relating to the twelve month debentures. (ivx) On the 7th October 2009 they received an email from Realcor titled *"Debentures,"* to which were attached two spreadsheets in excel titled *"GHR deb and GHR deb 11,"* that reflected the details of the debentures as follows:

"73.1 GHRdeb 9 there that been 1.852 'sales' of debentures in Gray Haven Reachers 9 for the period 1st October 2008 to 5th August 2009 totalling R282,127,913.28; and

73.2 GHRdeb 11: there had been 166 'sales' of debentures in Gray Haven Reaches 11 for the period 1 to 31st August totalling R30,563,526,71."[62] Upon receipt of the worksheet, the respondents confirmed with the bookkeeper of Realcor Mr. Cobus Stone that GHRdeb 9 and GHRdeb11 reflected investors who had purchased twelve month debentures in the two companies. The respondents claimed that at no prior occasion had they been aware of, or were provided with, details of debentures in GHR11 and neither had they even been aware of the existence of such an entity.

[58.] The respondents claimed that the short term debentures (that had not been disclosed to them) and the finance raised therefrom and the application of such funds by Realcor impacted directly on their mandate as managers and

[61] Second respondents answering affidavit para 69.4 page 184.

meant that they were therefore not in a position to finalize their report to the Registrar of SARB in terms of the directive. They claimed that, "*To the contrary, the purported fulfillment of the directive, that is the repayment of the moneys to the investors, had on the face of it given rise to a further non-compliance by Realcor with the provisions of the Banks Act and a series of further irregularities, all of which required their inspection and intervention. (read management)"*[63] They claimed that a further series of investors had become entitled to repayment by Realcor of their investment, by reason of their non-compliance, and contravention of the Banks Act under the protection provided by section 84 of the Banks Act.

[59.] The respondents claimed that they continued with their communication and interaction with the directors of Realcor with regard to the repayment of the twelve month debentures to investors on instruction of the Registrar of SARB as an extension of their *"mandate and appointment under the 2008 directive in question."*[64] The applicants in their replying affidavit disputed that the respondents' mandate had been extended as they claimed *"no written proof"* [65]of such extension had been provided by the respondents.

[60.] The respondents recorded that at all material times throughout their appointment and throughout the period until late 2009 and into 2010 Realcor administrated, operated and controlled the assets and business activities of

---

[62] Second respondents answering affidavit para 73, 73.1, and 73.2 , page 185
[63] Second respondents answering affidavit para 76, page 186
[64] Second respondents answering affidavit para 77, page 186

Realcor, including the construction of the Hotel by MSI. The respondents claimed that the representatives of Realcor had persuaded them that Realcor was both able to repay investors and that they would in fact be repaid. They claimed that they were reliant on the information and documentation provided to them by Realcor through its directors and/or legal representatives as they, were not in possession of the financial records of Realcor. They claimed that the affairs of the companies and all the relevant financial information and documentation remained in the hands of and under the control and direction of Realcor and de Ridder in particular.

The second period.

[61.] The respondents referred to a meeting held in February 2010 at the offices of the Reserve Bank, attended by: the respondents, represented by Mr Trevor Hills, an associate director in the first respondent; Realcor, represented by an audit committee member; de Ridder; Viljoen; and attorney Mr AJ Coetzee, (who at that time had replaced Laubscher of Heunis & Heunis as attorneys of Realcor). At the meeting Coetzee explained that the debentures were compulsory convertible debentures which had to be converted to shares within a period of twelve months of issue and on expiration of the twelve month period the compulsory convertible debentures would in fact have to be converted into shares. The shareholders would be permitted to either sell the shares converted or to retain them. The respondents explained through Hill that the SARB had no objection to the conversion of the twelve month debentures to shares on

---

[65] Second respondents answering affidavit para 77 page 186

condition that no holder would be forced to accept such conversion and that those who chose not to convert their investment to shares should be repaid. It was also agreed at the meeting by all present that the twelve month debenture holders in question would be presented with the option of either converting their instruments to shares or to be repaid at the end of the twelve month period. The respondents claimed that they understood that Realcor would implement such agreement.

[62.] On the 17th June 2010 the respondents received an email from de Ridder in which she set out the proposal to be made to the compulsory debenture holders with regard to the conversion of their debentures to shares, and the alternative choice they had to be repaid the investment on due date, with a thirty day notice period. The respondents claimed that they thereafter wrote several emails to de Ridder and Coetzee requesting further details and the progress of the payments to the remaining twelve month debenture holders. The respondents in that period also called for and received financial information from Realcor dating back to 2008 that enabled them to do solvency testing on GHR9, and GHR11. It appeared that up until June 2010 the information provided to the respondents by Realcor indicated that it was able to repay all unconverted twelve month debentures as and when they fell due.

[63.] During the second period it however became apparent to the respondents that the investment companies in question and Realcor as a whole were experiencing cash flow problems. At about June, July 2010 Realcor was no

longer able to repay the twelve month debentures in the ordinary course as and when they fell due. This, the respondents claimed, was unrelated to any conduct on their part as managers as they had not procured the acceleration of the repayment dates. The respondents recorded that as at the 5th November 2010 according to the records an amount of R27,399,568.24 million had not been repaid to the remaining twelve month debenture holders.

The third period.

[64.] The respondents explained that during February 2014 a Realcor investor provided them with information and documentation, the details of which were set out in an affidavit in a matter which came before a court in this Division under case number 15243/11 instituted by Realcor for the business rescue of Africa's Best 258 (Pty) Ltd, one of the Realcor companies. The second respondent had also deposed to an affidavit in that matter about the information received from the Realcor investor which indicated that Realcor had not made full disclosure to the respondents regarding the identity of investors who had advanced money relating to the fixed period twelve month debentures and the extent of the investments made. The second respondent claimed that when this issue was raised with Realcor and in particular with de Ridder and Prinsloo (the attorney who assisted de Ridder in the proposed business rescue plan), their response did not adequately address the respondents' concerns. They claimed that de Ridder and Wimpie Nortje; the marketing director of Realcor, simply declined to consult with the respondents on these concerns.

[65.] The respondents claimed that as a result of the various allegations made by the investor and anonymous sources the second respondent together with employees of the first respondent travelled to the offices of Realcor in Grabouw on the 23rd February 2011 to consult with de Ridder and Nortje. Both of them refused to attend the consultation. The second respondent claimed that they also requested to be allowed access to certain documentation and data but the request was denied. The respondents thereafter took steps to preserve the documentation which they believed was relevant for their inspection by placing the documents in boxes and sealing it in the presence of Realcor representatives. They also made arrangements with members of Realcor for Realcor to have access to the documents but not to remove them from the premises.

[66.] The respondents claimed that during this period they also received information that a substantial portion of funds from investors, in excess of R140 million, had not been used for the construction of the Hotel. This, the respondents claimed, was contrary to what was set out and promised to investors in the Prospectuses of the various investing companies.

[67.] At this stage the respondents appointed a team of quantity surveyors, SM Maré & Associates (SM & Maré), to prepare an independent valuation of the Hotel development. It appeared from the valuation and calculations made by the respondents and based on financial information furnished to them by Viljoen and Realcor that the estimated costs presented in respect of the Hotel development

were overstated by approximately R155 243 646.00. It appeared that approximately R650 million had been collected from members of the public through Prospectuses issued in GHR9, GHR11 and Iprobrite Ltd. This the respondents indicated would imply that the further R5,993,881,00 remained unaccounted for.

[68.] The valuation prepared by SM & Maré indicated that the estimated costs for the completion of the Hotel excluding VAT was R76,800,000,00. The respondents claimed that, but for the monies in question having been diverted, sufficient funds had been available for the completion of the hotel.

[69.] In March 2011 the respondents addressed a letter to Prinsloo and de Ridder in which they raised the issue of alleged misappropriation of the R140 million invested by members of the public in GHR9, GHR11 and Iprobrite Ltd which was apparently used for matters unrelated to the construction and development of the hotel. In April 2011 Prinsloo responded by denying the misappropriation of the R140 million. A trial balance prepared by Realcor for MSI for the period 1 July 2010 to 30 July 2011 was attached to the letter in support of the manner in which the funds were invested in GHR9, GHR11 and Iprobrite. Prinsloo stated that a Mr Bernard Shaw of BSO Chartered Accountants had verified the figures in the annexures. The respondents claimed that when they contacted Shaw he confirmed that R27 Million of the R47 million reflected as additional special requirements from Radisson Capitalize was verified. No other

amounts in the annexures had been verified by Shaw and/or by BSO Chartered Accounts.

[70.] The respondents further claimed that from the financial records of Realcor and from the information obtained from the employees of Realcor in respect of the general ledger and trial balances they found significant differences to the records which Prinsloo had provided to them. They thereafter made contact with Prinsloo on the 31st May 2011 who advised them telephonically that his relationship with de Ridder had broken down, that she was no longer being co-operative and that she was reluctant to provide access to the sealed documents.

[71.] The respondents claimed that they thereafter took the decision to exercise their powers in terms of section 4 of the Inspection and Financial Institutions Act to move the boxes containing the sealed information to a secure premises. When the representatives of the first respondent attended at the premises of Realcor on the morning of 2nd June 2009 to remove the boxes they found that the seals on all the boxes except one had been broken and resealed, the seals on filing cabinets containing relevant information had been broken and seven boxes had been removed from the premises. They claimed that the information in the seven boxes were essential to their inspection and they had reason to believe that de Ridder may have attempted to destroy the evidence which had been removed. The respondents claimed that they were informed that de Ridder had requested staff to install a virus on the data server which would have the effect of destroying and corrupting the data. They, were also informed that on the 30th

May 2011 de Ridder instructed an employee to change the figures contained in the accounting records of Realcor and which had been saved on the data server. They also received information that the boxes had been removed apparently by de Ridder's husband, Jacques de Ridder, and information as to where the boxes were stored. With the assistance of the South African Police they retrieved the boxes.

[72.] The respondents claimed that as they had access to the documents and the financial records of Realcor they were better able to assess the financial position of Realcor and the funds it held and to consider whether there had been any misappropriation of funds within Realcor. By the 22nd June 2011 they established sufficient irregularities to motivate them to request Absa Bank that account 40472993149 held in the name of Purple Rain Properties No. 15 (Pty) Ltd (a Realcor company) be made available to accept only deposits but that no withdrawals or transfers out of these accounts were to be made without the express permission of either of the respondents. A similar process was invoked with First National Bank. They explained that the requests to the banks were necessary as the Registrar of SARB had a direct interest in ensuring that all the remaining holders of twelve month debentures, the total value of which at that stage amounted to in excess of R27 million, were repaid in full and in circumstances in which it appeared, that Realcor was not doing so and in fact appeared to be disbursing funds and where it may well have been trading while insolvent.

[73.] The respondents thereafter made payments from these accounts to cover legitimate expenses of Realcor and payable in the ordinary course of the day to day conduct of the business, which included payment of salaries of employees and other similar related administrative costs and charges. This continued to be the position until Realcor was wound up by order of this court and thereafter administered by the appointed liquidators.

[74.] The respondents placed on record that at no time had they interfered or sought to interfere with the business of Realcor and particularly the completion of the hotel by MSI and the commencement of the trading of the hotel as a business concern. They stated that rather than having dictated matters they permitted the directors and representatives of Realcor to make proposals to them (as the managers on behalf of the Reserve Bank) as to how the non-compliance and/or contraventions of the Banks Act were to be addressed and remedied. In doing so they consistently attempted to work with Realcor and had on numerous occasions requested the directors of Realcor to present a plan to remedy and or address the illegal instruments. They further claimed that at no stage had the respondents ever insisted on *"immediate repayment"*[66] of either the short term loans made by members of the public to various entities in the Realcor Group or the twelve month debentures issued in GHR9 and GHR11. The repayment of the short term loans were made according to an accelerated schedule as proposed by and presented by Realcor and which repayment was closely monitored by the respondents and their representatives. They claimed that the

twelve month debentures were repaid or converted to shares as and when the instalments fell due and as far as they were aware none of these instruments were repaid before the due date.

[75.] The respondents claimed that the failure to complete the hotel was entirely unrelated to any act or omission on the part of the respondents or on the part of the Reserve Bank. They submitted that as a matter of overwhelming probability the inescapable inference to be drawn from the facts was that the failure on the part of Realcor to complete the Hotel and open its doors for trading as planned was due to the misappropriation by Realcor of in excess of R140 million intended for those very purposes.

[76.] The respondents submitted further that as a matter of probability had those funds been properly applied the Hotel would have been completed. The Hotel would have been in a position to trade and conduct its business and in those circumstances the final financial position and solvency of Realcor and of MSI in particular may have been entirely different to that which was presented at the time of their winding up.

The legal premise of the application.

[77.] One of the principal contentions of the applicants' claims, and which formed a central dispute between the parties was their interpretation of the provisions of Chapter 3 of the Banks Act, in particular sections 81 to 84, to the

---

[66] Second respondents answering affidavit para 180 page 215.

effect that the appointment of each of the respondents as a *"manager"* under the Act has a matter of law the following consequences;

(i) The *"managers"* replaced the directors of the company in respect of which the statutory provision and related directive applied, and

(ii) That in effect the managers *"step into the shoes"* of the directors of the companies subject to the directive thereby *"acting as directors"* and taking upon themselves and exercising all the powers, duties responsibilities and functions of such position;

(iii) The directors of the company no longer function as such and lose all their powers of authority in decision making and become entirely subservient to and subjected to the authority of the managers; and

(iv) That the managers *"de lege"* and *"de facto"* operate and administer the company's assets and business, and are both responsible and accountable for the operation and administration thereof as if they were the directors of the company.

[78.] In considering the interpretation of the provisions of Chapter 3 of the Banks Act Mr Kuschke SC, who together with Mr Walters and Mr Smith appeared on behalf of the respondents, correctly submitted that the applicants' approach overlooked the fact that the provisions in the Banks Act relate only to the control by the Registrar of certain specified activities by persons not registered as a bank but who nevertheless take deposits from the public and in so doing carry on the business of a bank in contravention of the express provisions of the Banks Act.

In this regard the taking of deposits from the public is a very specific activity against which the intervention by the Registrar is directed.

[79.] In terms of section 83(1) of the Banks Act, where an inspection under section 12[67] of the South African Reserve Bank Act 90 of 1989 reveals that a person has obtained monies by carrying on the business of a bank (taking deposits from the public) while not registered as a bank or without being authorized in terms section 18A(1)[68] of the Banks Act to carry on the business of a bank, the Registrar may direct that person in writing to replace such money, including any interest and any other amounts owing by him or her in respect of such money, in accordance with the requirements of the Act in such period as the Registrar may specify by notice. Central to this provision is the taking of money from the public and the directive (my underlining) to replace same. In terms of section 84(1) of the Banks Act,[69] simultaneously with the issue of a

---

[67] *"**12 Inspection of affairs of person, partnership, close corporation, company or other juristic person not registered as bank or mutual bank***
(1) If the Governor or a Deputy Governor has reason to suspect that any person, partnership, close corporation, company or other juristic person who or which is not registered in terms of the Banks Act, 1990 (Act 94 of 1990), as a bank or in terms of the Mutual Banks Act, 1993 (Act 124 of 1993), as a mutual bank, is carrying on the business of a bank or a mutual bank, he or she may direct the Registrar of Banks referred to in section 4 of the Banks Act, 1990, to cause the affairs or any part of the affairs of such person, partnership, close corporation, company or other juristic person to be inspected by an inspector appointed under section 11 (1), in order to establish whether or not the business of a bank or mutual bank, as the case may be, is being carried on by that person, partnership, close corporation, company or other juristic person.
(2) The provisions of sections 4, 5, 8 and 9 of the Inspection of Financial Institutions Act, 1984 (Act 38 of 1984), shall apply mutatis mutandis in respect of an inspection carried out in terms of subsection (1).
[S. 12 substituted by s. 6 of Act 10 of 1993 and by s. 7 of Act 2 of 1996.]"

[68] *"**18A Branches of foreign institutions***
(1) An institution which has been established in a country other than the Republic and which lawfully conducts in such other country a business similar to the business of a bank (hereinafter in this section referred to as the foreign institution) may, notwithstanding the provisions of section 11 (1), with the prior written authorization of the Registrar and subject to the prescribed conditions and to such further conditions, if any, as the Registrar may determine, conduct the business of a bank by means of a branch in the Republic."

[69] The manager shall as soon as may be practicable report to the Registrar whether or not the person subject to the relevant direction is, in the manager's opinion, solvent, and if the manager finds that the

written directive the Registrar must appoint a person, described as *"a manager,"* to manage and control the repayment of the monies unlawfully obtained. This appointment is by letter and signed by the Registrar and in my view relates very specifically to the directive to the company to repay the money unlawfully raised by taking deposits in contravention of the Banks Act.

[80.] The applicants rely in particular on the provisions of sections 84 (1)(A)(a) as their basis for the claim that the *"managers"* (the respondents) were required to have taken possession and control of all the assets of the entities and/or persons subject to the relevant direction. Section 84(1)(A)(a) provides that;

84 Management and control of repayment of money unlawfully obtained.

"(1A) (a) The repayment administrator shall at the request of the Registrar, as soon as may be practicable report to the Registrar whether or not the person subject to the relevant direction is, in the repayment administrator's opinion, solvent, and if the repayment administrator finds that the person subject to the direction is insolvent, the repayment administrator shall comment on whether such person is technically or legally insolvent.

[Para. (a) substituted by s. 42 (b) of Act 22 of 2013.]

(b) On appointment of a repayment administrator and whilst the person is subject to the relevant direction as contemplated in this section-

(i) the repayment administrator shall recover and take possession of all the assets of the person subject to the relevant direction; and (my underlining)

---

person subject to the direction is insolvent, the manager shall comment on whether such person is technically or legally insolvent.

(ii) all actions, legal proceedings, the execution of all writs, summonses and other legal process against the person subject to the relevant direction shall be stayed and not be instituted or proceeded with without the leave of the court and without also serving the legal process documentation on the Registrar.

[Para. (b) substituted by s. 42 (b) of Act 22 of 2013.]

The *"manager"* must act on behalf of and under the control of the Registrar in terms of section 84(3)[70] and may from time to time apply to the Registrar for instructions in regard to any matter arising out of or in connection with the performance of his or her duties in terms of subsection (4). The duties of the manager are prescribed in subsection (4) and in particular accords to the manager the responsibility to conduct such further investigations into the affairs of the persons subject to the direction that the Registrar may deem necessary in order to establish;

(i) The true amount of the money unlawfully obtained by the person as contemplated in terms of section 83(1);

(ii) The identities of all persons from whom such monies were so unlawfully obtained;

(iii) Where any such money or assets into which such money was converted are kept or can be located; and

(iv) any other fact which in the opinion of the Registrar or the manager needs to be established in order to facilitate the repayment of such monies in terms of the relevant direction.

---

[70] *"The manager shall act under the control of the Registrar, and the manager may from time to time apply to the Registrar for instructions in regard to any matter arising out of or in connection with the performance of his or her duties in terms of subsection (4)."*

[81.] Counsel for the respondents submit, and in my view correctly so, that as a matter of ordinary construction and with particular reference to the clear and unambiguous language of the provisions of the Act, the persons so appointed by the Registrar as *"managers";*

(i) do not replace the directors of the company in respect of which the statutory provision and the later direction apply; to the contrary the directors remain in office and continue to act and exercise the powers of their position and remain responsible and accountable as directors of the company in the ordinary course; and

(ii) do not take it upon themselves the powers, duties, responsibilities and functions of those directors;

(iii) that contrary to the submission by applicants' counsel, the powers, duties and functions of the managers are limited and restricted to the purpose set out in the Act, the letter of appointment by the Registrar and the further directions and requirements of the Registrar, and only for as long as the managers hold office and remain under the Registrar's control, acting as his or her agents.

[82.] The Registrar and therefore also the managers have in my view only limited powers of *"interference and/or involvement"* in relation to the company, its affairs and its assets as the company remains under the effective control of the directors and shareholders. Such limited *"interference"* is aimed at ensuring

ongoing and proper compliance with the provision of the Banks Act and the repayment of monies unlawfully obtained in contravention thereof.

[83.] The principal functions of the manager as set out in the Act are to *"manage and control the repayment of money in compliance with the directions by the persons subject thereto"* and not to conduct or administer the operation, affairs and business of the company under directive as the directors remain seized with that responsibility.

[84.] The powers and duties of the managers are therefore confined to the repayment of money unlawfully obtained by the company under the directive that carried on the business of a bank without being registered as such or without authorization in terms of section 18A(1). Such powers and duties are unrelated to the remaining assets and business of the entity under directive save to the extent that such assets are directly relevant to ensure the repayment of the money, such as the circumstances in which the respondents issued the request to ABSA and FNB and attended to payment of the day to day expenses of the companies.

[85.] Counsel for the respondents submitted and correctly in my view that following the same logic and principle the duty of the managers to report on the question of the legal or technical solvency of the entity/person under directive is not a general one but is directed specifically at the ability (or inability), as the case may be, of the entity to repay the monies in question. Similarly, the

recovery of and taking possession of assets of the person or entity subject to the directive is confined for that same purpose and object, namely, to ensure the repayment of monies in question. In context; the powers duties and functions of the manager must be construed within the primary purpose for which the Registrar, through the appointed manager, must ensure the repayment of monies unlawfully obtained by the taking of deposits in contravention of the Banks Act. I am therefore unable to agree with the contention by the applicants, and which was reiterated in argument by Mr Uijs S.C, who together with Mr. Banderker appeared for the applicants that the respondents enjoyed a "*wide mandate"* with extensive powers to take control of and deal with *"all assets"* of the Realcor companies under directive and that they, by virtue of the Act, replaced the directors of the companies and were responsible for the day to day financial affairs of the companies. Moreover in my view, it appeared that they dealt with the assets for the limited purpose of fulfilling their oversight function and role under the directive and to ensure the repayment of the monies unlawfully raised in contravention of the Banks Act.

[86.] I further find that the respondents had clearly established and demonstrated that as a matter of fact (and in part supported by the claims of the applicants themselves) that the respondent's did not take control of, direct and/or administer the affairs, assets and/or conduct of the business operations of Realcor save to the extent as specifically required for the carrying out of their mandate. In this regard the applicants claimed that the respondents' instruction to the various banks to freeze the accounts of the companies under direction and

their payment of the day to day expenses and costs that related to the construction of the hotel amounted to a manifest demonstration that the respondents had in fact taken over control over the assets of the companies. The respondents explained though that as a result of the conduct of the directors of Realcor and the risk of the continued dissipation of the assets of Realcor, they did so for the very specific purpose of ensuring the repayment of the remaining amounts owed on the twelve month debentures to investors.

[87.] I might add that it would moreover have been entirely impractical for three persons (the respondents) to have taken control over the entire financial affairs of the Realcor companies. If that was in fact intended their letter of appointment would have stated it in clear terms.

The respondents' claim that there is no basis set out for the relief sought by the applicants.

[88.] The respondents submit that the applicants have not set out the basis upon which the relief they seek is founded and that they have not formulated such relief clearly and coherently both in the Notice of Motion and in their founding affidavits. The case made by the applicants, they submit (such as it is), is vague and embarrassing. As already indicated, in prayer 1 of the Notice of Motion the applicants placed reliance on the alleged failure *"to act as envisaged in terms of section 84 of the Banks Act, 1990."* In the founding affidavit the applicants assert a failure *"to act in terms of section 81 to 84 of the Banks Act."* The respondents contend that the applicants failed to set out, or to describe with

any sufficient detail, the precise acts or omissions of the respondents on which they rely, and how such acts/omissions constitute violations of any specific provisions of the Banks Act. The respondents' contention in my view is not entirely without merit. The litany of complaints raised by the applicants in their founding affidavit were characterized by a lack of yet most were raised without any particularity, rather appearing as general assertions of what they understood to be the respondents' failure to have complied with their duties and responsibilities under the provisions of the Banks Act. The recurrent complaint raised by the applicants was that the respondents had failed to take control over all the assets of Realcor, in circumstances in which they were responsible for the daily inflow and out flow of monies and that the subsequent liquidation of the Realcor group occurred under the watch of the respondents which they ascribed as due to the failure of the respondents to have properly carried out their functions. The respondents readily conceded that they had not taken control over all the assets of the Realcor group; that they had not taken over the directorial functions in the companies and were not responsible for its day to day running. They claimed that they understood their mandate as being limited to achieving the purposes of the provisions in Chapter 3 of the Banks Act and their primary concern and responsibility was to oversee the repayment of monies unlawfully obtained from investors in contravention of the Banks Act. Moreover, they implicitly relied on the information they received from the directors and staff of Realcor with regard to the liquidity of the companies. The applicants themselves had accepted that the companies were liquid and had not asserted a

view contrary to that under which the respondents had laboured (on the representation by the directors and officials of Realcor).

[89.] The respondents also explained that towards the end of the second period and during the third period for the first time did it appear from enquiries made by them, that the Realcor companies had suffered a cash flow crisis and were not able to meet the obligations to the remaining twelve month debenture holders. They had at that stage also received information that approximately R140 million earmarked for the development of the hotel had been misappropriated. Given the above it is unclear on the information provided by the applicants on what basis it could be found that the respondents had failed to comply with their responsibilities under section 84 of the Banks Act or that their actions has led to the eventual demise of the Realcor Group.

[90.] The respondents further contended that the applicants failed to identify what conduct they wish to have declared unlawful and *ultra vires*. It was likewise not asserted with any clarity in the founding affidavit, and indeed no case is made out by the applicants, as to how and in what respects the respondents exceeded or acted outside any statutory powers delegated to them. To the contrary the applicants claimed that the respondents failed to carry out their functions in accordance with the *"wide powers"* accorded to them.

[91.] During the course of argument, Mr Uijs submitted that while the applicants were not raising, nor were they seeking to rely on, a claim that the twelve month

debentures were not in fact *"unlawful,"* (contrary to their assertions in the founding affidavit) he nonetheless contended that *"an argument to that effect"* could be made. He submitted also that in terms of section 83 of the Banks Act no lawful basis had been established by the respondents or by the SARB to have instructed Realcor to repay the amount raised by way of the *"twelve month debentures"* as such an instruction was not permitted within the provisions of section 83 of the Banks Act. He submitted that an inspection in terms of section 12 of the South African Reserve Bank Act as contemplated in section 83 first ought to have been conducted. If as a result of the inspection the Registrar was satisfied that the twelve month debentures were in contravention of the provisions of the Banks Act only then could a directive have been issued, first in terms of section 83(1), and in terms of the provisions of section 84 a manager was to have been simultaneously appointed. For that reason he submitted that both the respondents and the Registrar of the Reserve Bank had acted outside of the provisions of sections 83 and 84. Mr Kuschke, very appropriately, in a short response referred to the fact that such contention had not been raised in the founding papers or for that matter in any of the affidavits filed on behalf of the applicants and that the respondents had not had the opportunity of responding to such a claim. Mr Kuschke submitted that the respondents were being *"ambushed"* in argument and relied on the recent unreported decision of **Iris Arillda Fischer and Another v Boitumelo Ramahlele and Forty-Six Other Respondents ((Case No: 203/2014), 27 May 2014, Delivered 04 June 2014.** On the same basis Mr Kuschke submitted that the applicants had also raised the issue of the respondents' non-compliance with the provisions of the Act by their

alleged failure to have made a formal report about the insolvency or otherwise of Realcor for the first time in their Heads of Argument. Needless to say, the applicants are confined to their founding papers and as far as their complaints and claims are made against the respondents and could not simply in argument, whether in writing or orally have raised new factual contentions. Moreover inasmuch as the applicants challenged the authority of the Registrar of the SARB to have issued the instruction to the respondents to investigate the 12 month debentures, the applicants ought to have joined the Registrar as a party to these proceedings. They, with ample opportunity, chose not to do so.

The indemnification sought.

[92.] In respect of the relief sought with regard to an indemnification, the respondents contend that the applicants had failed in their founding affidavit to make out any case for such relief based on an apparent breach of a statutory duty imposed on the respondents in the Banks Act or in any other legislation for that matter. To the extent that the applicants sought to rely on the imposition of a duty (of care) on the respondents, either individually or collectively, arising from sections 81 to 84 (inclusive) of the Banks Act, the applicants were required to have proved each of the elements of such duty and its breach.

[93.] In this regard the respondents contended that applicants, in the context of sections 81 to 84 of the Banks Act had failed both: to establish that the respondents owed a duty of care to each or either of them; to have alleged and proved all the requisite elements of the *"aquilian"* liability, in particular, negligent

or reckless conduct (whether by acts or omission) that correlated to any such legal duty; and to have proved a causal link between such alleged act or omission and any financial loss or other form of damages that the applicant may have already suffered, or will in the future suffer.

[94.] Mr Kuschke pointed out that the applicants were burdened with having to prove the element of wrongfulness and added that the court in its consideration of the element would have to take into account not only the interests of the parties, but also that of the broader community, and any conflicting interests would have to be carefully weighed and balanced. He referred to the decision of Hefer J on point in the matter of **Minister of Law & Order v Kadir 1995 (1) SA 303 (A) at 318E-318J**

"As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which 'shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people' (per M M Corbett in a lecture reported sub nom 'Aspects of the Role of Policy in the Evolution of the Common Law' in (1987) SALJ 104 at 67). What is in effect required is that, not merely the interests of the parties inter se, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands. (Corbett (op cit at 68); J C van der Walt 'Duty of care: Tendense in die Suid-Afrikaanse en Engelse regspraak' 1993 (56) THRHR at 563-4.) Decisions like these can seldom be

taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited earlier Fleming rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of all the circumstances of the case and of every other relevant factor…."

[95.] In their founding affidavits the applicants asserted, which was emphasized in argument by their counsel, that the respondents owed the applicants a duty to have disclosed to them and to the investing public their appointment by SARB as the investigators, and as managers; the reasons for such appointment and the contents of the report of the investigation conducted by them. Applicants claimed that had such disclosure been made to them or the investors the investors would have elected not to have re-invested in Realcor and they as brokers would not have marketed and sold the investments. Mr Uijs submitted that the respondents were further obliged to have informed the investors that they were entitled to the *"immediate repayment"* of the short term loans which were deemed unlawful in contravention of the Banks Act. The respondents contend that inasmuch as they were appointed as inspectors to investigate, and/or as managers, they were employed as officers of the Reserve Bank and any report made by them in that capacity fell within the confidentiality provisions of section 33[71] of the South

[71] ***33 Preservation of secrecy***
(1) No director, officer or employee of the Bank, and no officer in the Department of Finance, shall disclose to any person, except to the Minister or the Director-General: Finance or for the purpose of the performance of his or her duties or the exercise of his or her functions or when required to do so before a court of law or under any law-
(a) any information relating to the affairs of-
(i) the Bank;
(ii) a shareholder of the Bank; or

African Reserve Bank Act. The respondents contended that they were also bound by sections 84 (1)(e)[72] of the Banks Act. They submitted that as such, they were prohibited from disclosing the contents of the report, and any information contained therein, to any person. The applicants they added had not made out a case as to why the confidentiality provisions should be overridden. The respondents also point out that the applicants had themselves complained that the communications sent out on the 3rd November 2010 informing brokers about the directive and the repayments were a breach of the very confidentiality provisions. The respondents point out further that upon their appointment at the initial meeting with the directors and the staff of Realcor they were specifically requested by Realcor not to disclose and to make public their investigations and in particular their findings as it would have impacted on the *"kliente vardisie"* of Realcor. Moreover, respondents submitted that they could not have made disclosure of their investigation, and the findings, as the interests of all the investors, and in particular those who invested lawfully in the Realcor Group, could have been adversely impacted upon by such disclosure or publication.

(iii) a client of the Bank,
acquired in the performance of his or her duties or the exercise of his or her functions; or
(b) any other information acquired by him or her in the course of his or her participation in the activities of the Bank,except, in the case of information referred to in paragraph (a) (iii), with the written consent of the Minister and the Governor, after consultation with the client concerned.

[72] "*Any written report to the Registrar by an inspector appointed in terms of section 83 or any report by a repayment administrator appointed in terms of this section is confidential and shall not be disclosed to any person: Provided that the Registrar may, notwithstanding the provisions of section 33 (1) of the South African Reserve Bank Act, 1989 (Act 90 of 1989), furnish such report to-*
(i) the person subject to an inspection in terms of section 83 or that is subject to a directive in terms of section 84;
(ii) a person or institution contemplated in section 89;
(iii) a relevant division of the South African Police Services or the National Prosecuting Authority;
(iv) any other person that can prove, to the satisfaction of the Registrar, a legitimate interest in the matter and only upon payment of a prescribed fee and with the written consent of the person subject to the directive; or

[96.] In a time-line of events tabulated by the applicants in their founding affidavit they stated that *"On 9th June 2009; brokers informed that the twelve month loan agreement investors have been repaid in terms of directive."*[73] It is apparent and contrary to the respondent's claim they had only received information in November 2010 of the investigation and directive by the Registrar in Realcor. Notwithstanding such information it appeared investors chose to re-invest in the Realcor group as applicants claimed *"they,"* the investors, *"were satisfied with the investment that they received in the scheme."*

[97.] Counsel for the respondents correctly pointed out that the investors in both the unlawful twelve month loans and the unlawful twelve month debentures schemes would not have been entitled to an immediate repayment of their investment and neither was such entitlement prescribed in the mandate of the respondents from the Registrar.

[98.] Inasmuch as the applicants also contended that the investments (the short term loans and 12 month debentures) were *void ab initio* and that the investors were therefore entitled to its immediate repayment respondents relied on the decision of Southwood AJA in **Dulce Vita CC v Van Coller & Others (192/12) ZA SCA 22 (22 March 2013),** which states at para [35], *"… there is no provision in the Banks Act which provides or even indicates that if the promoter of a public property syndication scheme, in contravention of the Bank's Act, raises funds by*

(v) any duly appointed provisional liquidator or provisional trustee of the person subject to the directive."

[73] First applicant's founding affidavit para 31.11, page 20.

accepting loans against the issue of debentures this would have had the effect that the whole scheme is unlawful." Furthermore in **Gazit Properties v Botha & Others NNO 2012 (2) SA 306 (SCA)** Majiedt JA held that a contravention of the Bank's Act does not result in the illegality of the agreements in terms of which the deposits are made and stated at para [35]: *"There is nothing in the Act that leads to such a conclusion, see Oilwell (Pty) Ltd v Protec International Ltd and Others 2011 (4) SA 394 (SCA) para 19. To the contrary, the provisions of s 83(1) of that Act, which empower the Registrar of Banks to direct the recipient of money unlawfully obtained while unlawfully carrying on the business of a bank to repay such money, lead ineluctably to the opposite conclusion."* The respondents contended and correctly so that there was no basis on which any of the investors in the unlawful schemes involving the twelve month loans or the twelve month debentures would have been entitled to an immediate repayment of their investment.

[99.] In considering whether there was a legal duty on the respondents to have disclosed the investigation report and its contents to the applicants and the investors this court must consider not only the applicants' interests but also the competing interests of other lawful investors and moreover the fact that respondents were bound by statute to have kept such report confidential. I am satisfied that applicants would in such circumstances not have been entitled to the disclosure of the report or any information contained therein from the respondents.

[100.] The respondents submit further that the applicants failed to make out any case in support of their contention that the respondents were negligent in the carrying out of their duties both in terms of the Banks Act and/or in their capacities as managers. The test for negligence finds its authoritative statement in the dictum of Holme JA in **Kruger v Coetzee 1966 (2) SA 428 (A) 430.**[74]

[101.] In their founding affidavit, the applicant at best vaguely referred to negligence on the part of the respondents and certainly did not provide detail what conduct of the respondents constituted such negligence.

[102.] As already indicated the applicants claimed in their founding affidavit that the basis for their application was *"rooted"* in a finding made by the FAIS Ombudsman against a fellow broker who was found to have been negligent in the performance of his duties. The applicants however do not in any measure or detail give any particularly as to the basis on which their clients, the investors, were persuaded or enticed as a result of the acts or omissions of the respondents to have made any further investments in Realcor (in respect of the twelve month debentures), and no details were given of the basis that they (the applicants) could or would be found to have been negligent by the FAIS Ombudsman. Moreover, the respondents contend that the applicants themselves had a duty to have done a proper due diligence into the Realcor

---

[74] "*For the purposes of liability culpa arises if –*
(a) diligens paterfamilias in the position of the defendant –
(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
(ii) would take reasonable steps to guard against such occurrence; and
(b) The defendant failed to take such steps…"

companies in which they were selling investments and their failure to have done so was negligent. The respondents contended and in my view correctly that the applicants are certainly not entitled to be indemnified by the respondents against their own negligence and have not in these proceedings established any negligence on the part of the respondents.

[103.] Moreover, neither in the founding papers nor in argument did the applicants even attempt to make out a case that there existed a nexus between any damages that they or their clients might suffer and the conduct of the respondents. Mr Uijs submitted that was really a matter for *"quantification"* for a later stage and he was moreover unable at *"this stage to point to any conduct"* on the part of the respondents that had led to the investments and or re-investments by investors. The respondents correctly contend that the applicants had clearly failed to establish any loss or that any loss was reasonably foreseeable or had established any causal link between any acts and omission on the part of the respondents and that the applicants would as a matter of probability suffer loss in the future. In my view, the applicants have, in these proceedings failed to prove liability on the part of the respondents that warrants any indemnification.

The legal standing of the applicants.

[104.] The respondents claimed that the applicants failed to establish a legal duty owed by the respondents, or any one of them, under the general category of *"investment brokers."* During the course of argument Mr Uijs submitted that the applicants did not seek to pursue the relief on behalf of *"any other broker"* as

contemplated in the founding affidavit and restricted the relief to that against the applicants only.

[105.] The respondents contended that the applicants had not established that any claim had in fact been instituted against themselves, merely stating in the founding affidavit that "…*investments sold by me after their appointment is the subject matter of complaints to the FAIS Ombudsman and consequently places me and my business at risk."* The applicants do not indicate that they are the subject of any particular complaint nor did they furnish any details of such complaint. The respondents point out, and correctly in my view, that the failure on the part of the applicants to have established that any claim had been made against them has two implications: the first being that the relief they sought was entirely academic and is founded on a hypothetical scenario, and secondly, at best for the applicants they have merely anticipated a possibility of a claim being made against them. In my view, at best for the applicants, their claims against the respondents are entirely premature.

Statutory limitation on liability.

[106.] **Section 88 of the Banks** Act provides as follows;

"88 Limitation of liability

No liability shall attach to the South African Reserve Bank or, either in his or her official or personal capacity, to any member of the board of directors of the said Bank, the Registrar or any other officer or employee of the said Bank, for any loss sustained by or damage caused to any person as a result of anything done

or omitted by such member, the Registrar or such other officer or employee in the bona fide performance of any function or duty under this Act." [S.88 substituted by s.62 of Act No. 19 of 2003]."

[107.] There was a difference of view between the parties as to whether the respondents could be regarded as *"employees"* and *"officers"* for the purposes of the immunity conferred in the statute. Neither the terms, *"employee"* nor *"officer",* are defined in the Banks Act and therefore the ordinary meaning attaches to both terms. An officer is an appointed functionary and while holding that office performs a duty, serves or functions as an agent for the principal. The manager was appointed in terms of section 84(1) by the Registrar, and at all times *"shall act under the control of the Registrar, and the manager may from time to time apply to the Registrar for instructions in regard to any matter arising out of or in connection with the performance of his or her duties."*

[108.] Counsel for applicants submitted that the applicants did not seek to persist in their claim that the respondents had acted *mala fide*. In the circumstances the conduct of the respondents, to the extent that it was done *bona fide* in the performance of any function or duty under the Act, clearly falls within the ambit of section 88 of the Banks Act. As such, each of them in my view, is therefore not liable for any losses claimed as a consequence of damage caused by them in the performance of functions for as long as they acted *bona fide* while carrying out such functions.

The defence raised by the respondents on the facts.

[109.] At the commencement of the hearing Mr Uijs submitted that the application was a *"very simple one*" and claimed that, *"most of the facts are common cause."* He submitted further that the principle issue was the interpretative question in respect of the powers, duties and responsibilities with which the respondents were endowed with in terms of Chapter 3 of the Banks Act. Mr Kuscke however pointed out that based on the contents of the founding affidavit of the applicants, their replying affidavit and on the very argument presented on behalf of the applicants at the hearing, there remained serious disputes of fact between the parties and that the factual disputes in the application had to be determined in accordance with the principles laid down in the matter of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**. One of the central disputes of fact related to the respondents' contention that they had not prior to the 2nd of September 2009 been aware of the contentious twelve month debentures which were the subject matter of the correspondence between them and the applicants' erstwhile attorneys Laubscher of Heunis & Heunis. In their replying affidavit the applicants sought to suggest that this dispute could only be resolved by oral evidence. They however placed no contrary evidence in their papers to challenge the version provided by the respondents with regard to the facts and circumstances surrounding the issuing of the relevant Prospectus in 2008. There was in my view clearly no basis to accede to the mere suggestion of a referral to oral evidence which in any event was not pursued with any measure of urgency by the applicants in argument. The matter is therefore to be determined on the facts as alleged by the

respondents together with those facts asserted to in the applicants' affidavits that have been admitted by the respondents and on such basis I am satisfied that the factual assertions overall made by the respondents are to be preferred over the vague claims by the applicants.

The appearance by Ms D de Ridder.

[110.] Shortly into the hearing of the oral argument Ms Deonette de Ridder the erstwhile director of the Realcor Group, interposed and requested the court to entertain an application by her to file an affidavit in response to various allegations made against her, in particular by the respondents. She informed the court that she has been sequestrated but that she had not obtained the permission from her trustee to intervene in the matter. She claimed that she had become aware of the application in about October, November 2013 and that she consulted with the first applicant in January 2014 with regard to the contents of the answering affidavit filed by the respondents. She furnished the first applicant with whatever information she had available. Mr Uijs left the request of de Ridder in the hands of the court while Mr Kuschke strenuously opposed the belated attempt at the filing of an affidavit by her. He pointed out that the matters that she sought to deal with, such as the R140 million, were in any event irrelevant to the determination of the relief and that her deposing to an affidavit would unnecessarily delay the proceedings and that she was not in a position to make good any order of wasted costs as a result of her status. Having considered Ms de Ridder's request and the submissions by counsel for the respondents I turned down her request as I was of the view that the matters that she sought to deal

with were irrelevant to the determination of the present matter and would have caused an unnecessary delay in the proceedings.

The various interlocutory applications and the questions of costs.

[111.] On the 9th May 2014 the applicants gave notice of an application in terms of which they sought an order against the second, third and fourth respondents for access to the complete and entire investigation report as compiled and furnished by them to the Registrar of Banks pursuant to their inspection into the affairs of Realcor. The application was opposed by the respondents and was meant to have been heard on the same day and prior to the hearing of the main application. The applicants abandoned the application on the morning of the hearing with an appropriate tender of costs by them.

[112.] The respondents for their part on the 19 March 2014 gave notice to the applicants that at the hearing of the main application an order would be sought striking out various portions of the affidavit of the first applicant's affidavit dated 3rd March 2014 (referred to as applicants' replying affidavit to respondents' supplementary answering affidavit). At the hearing of the matter counsel for the applicants indicated that the applicants would not seek to rely on the contents of the affidavit. It was therefore not necessary to deal with the application to strike out. The question of the costs of the striking out application was nonetheless argued by Mr Kuschke, who submitted that, given the gratuitous and defamatory statements made in the affidavit, much of which was irrelevant and vexatious that

the court should consider making a punitive order of costs against the applicants for the aborted application. Mr Uijs did not make any submissions on the issue and left it in the hands of the court. Having considered the affidavit filed on behalf of the applicants it is apparent that the content thereof was ill considered and would if the application was pursued, have been struck out. I am also of the view that the respondents are entitled to an order of costs on a punitive scale relating to the aborted striking out application.

[113.] In respect of the main application the respondents in their answering papers initially sought an order of costs on a punitive scale against the applicants but in argument Mr Kuschke appropriately submitted that such an order was not warranted.

[114.] T**he following order is made:**

(i) The application is dismissed with costs.

(ii) The applicants are ordered to pay the wasted costs occasioned by the Rule 35 application.

(iii) The applicants are ordered to pay the wasted costs occasioned by the aborted strike out application on an attorney and client scale.

(iv) The costs orders against the applicants are to be paid jointly and severally by the two of them.

Saldanha J