**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS**

**PRETORIA**

**Case Number: FAIS 05604/12-13/ GP1**

**In the matter between**

**JACQUELINE GEYER** **Complainant**

**and**

**CHARL DAWID KIRSTEN** **Respondent**

---

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

---

## A. INTRODUCTION

[1] Complainant had a number of small policies which were not performing well and consulted respondent for financial advice. Respondent advised her to cancel her policies and to invest the proceeds in Sharemax. Complainant heeded the advice and invested an amount of R188 782. The money was meant to support her when she went on pension. Her funds were lost when Sharemax failed and she filed a complaint with this office.

## B. THE PARTIES

[2] Complainant is Jacqueline Geyer who is currently unemployed and who is 62 years old. Her personal details are on record.

[3] Respondent is Charl Dawid Kirsten of 1526 Poortsig Street Waverley. Respondent is a financial services provider (FSP) with FSP no 703.

## C. THE COMPLAINT

[4] During 2009 complainant and respondent became friends. Complainant befriended respondents' wife and the friendship extended to respondent as well. Whilst complainant was employed, she invested in a number of policies with Old Mutual, Momentum and Sanlam. When these investments were made, complainant was receiving a monthly salary. The object of these investments was to provide income to assist her when she goes on pension.

[5] Between August 2009 and July 2010 complainant, on respondent's advice invested in Sharemax The Villa Retail Park Holdings Ltd (The Villa). The first investment was confirmed by Sharemax on the 9 August 2009 in an amount of R141 000. Thereafter two further amounts were invested; R10 000 in April 2010 and R37 000 in July 2010.

[6] Complainant received her first interest payment from Sharemax in an amount of R166 – 68 on the 2 September 2009; further payments were received between 30 September 2009 and July 2010, the average payment received was about R1500 per month. Thereafter she received nothing in August 2010 and a final payment of R45 – 90 on the 3 September 2010. Complainant has not received any further payments of the promised returns of 12% per annum interest. Complainant also lost her capital.

[7] When complainant noticed that payments from Sharemax stopped, she contacted respondent to find out what was happening. Respondent told her that construction had stopped and no interest will be paid until construction resumed. He also stated that the "project at Zambezi must first be finalised".

[8] In March 2011, complainant approached respondent and requested that her investment be withdrawn. She was informed that it was not possible to withdraw it as it was a long-term investment and she cannot have her money back. She was told by respondent to wait. She trusted respondent and only realised something was seriously wrong when, in October 2011, she read in the newspaper that Sharemax was bankrupt.

[9] Complainant tried to contact respondent and she is of the view that he ignored her. She wrote letters to him. Then respondent sent her the contact details of Frontier Asset Management who, according to respondent, was handling Sharemax's affairs. Frontier confirmed that no income can be expected for at least "5 to 7 years" and that complainant could lose all the money she invested.

[10] Complainant states that but for respondent's advice she would not have made the investment in Sharemax. She is adamant that respondent assured her that this was a safe investment. Complainant therefore holds respondent liable for her loss.

[11] I must point out that complainant, at all material times, was a person of modest means. At the time of making the investment she was employed as a clerk earning R123 091 – 65 per annum.

**D. RESPONSE**

[12] The complaint was forwarded to respondent and he was afforded a period of six weeks to attempt to resolve the matter with complainant. Even before complainant filed her

complaint, the parties were trying to settle the matter. However, it became clear, there would be no prospect of a settlement unless complainant got, at least, her capital paid back to her.

[13] Respondent sent his written response as well as a number of supporting documents. At the outset, it is worth noting that there are no substantial disputes of facts between the parties. Most of my findings are based on undisputed facts.

[14] It is undisputed that complainant made the investment in Sharemax on the advice of respondent. Nor does respondent dispute that but for his advice, complainant would not have invested in Sharemax. He confirms that he was a friend of complainant and that she approached him for financial advice. Complainant had approached him for advice "with her retirement issues". Respondent found that complainant had nine small policies with premiums ranging from R30 per month to R500 per month, there was also a single premium policy of R39 000. The policies were with Old Mutual and Sanlam. The cost of 9 individual products was strangling the growth of her investments. Complainant agreed to consolidate all her investments into one Momentum RA. At that time complainant worked for the Medical and Dental Council who had all their employee benefits in Momentum and that would have helped to streamline everything. This Momentum RA was cancelled.

[15] There was some disagreement between the parties when, after an accident, complainant wanted to claim for disability benefits on her policies. Respondent pointed out that disability benefits would have lasted about two months. After complainant's accident she became dissatisfied with respondent's advice regarding the consolidation of her small policies and filed a complaint against him with this office. Respondent states that he explained the process to complainant and thereafter the complaint was withdrawn. That complaint is unrelated to this complaint.

[16] Respondent makes the following statement regarding his advice to complainant: “I still stand by my point of view that everything I did for complainant was retirement related..”

[17] Respondent delivered documents from his file pertaining to this investment. I will make reference to this below.

**How the Sharemax investment was made**

[18] It began with complainant asking respondent’s wife for respondent to help her to get better returns on her investment. She was unhappy with her insurance products and she was experiencing a monthly shortfall in her income. She was then earning between 3.5% and 7.5% on her policies. Respondent agreed to assist and showed her a “prospectus of Sharemax investments”. Complainant took the document home to study and familiarise herself with it. Thereafter, respondent claims to have asked complainant if this was going to be a better product to achieve her goals, complainant assured him “she would like to enter this product.”

[19] Respondent then states that they “studied the prospectus again” and respondent explained to her what needed to be done to make the investment in Sharemax. According to respondent, complainant was engaged to a wealthy partner who could easily support her and she had her work pension. Her insurance investments were made fully paid up and not cancelled so that she could rely on those funds at retirement. Respondent then makes the following statement: “The Sharemax was only a small portion in this context and would not have had a substantial influence on her future position. It was merely to achieve better returns.” Respondents details as to how he advised complainant to invest in Sharemax and why he found the investment to be suitable for complainant’s needs is vague and lacking in detail. I will deal with this below.

**Why Sharemax?**

[20] At the time of advising complainant, respondent states that he was dealing with Sharemax since they launched their products in about 2000. Respondent never had a missed payment nor any complaints from anybody. Respondent claims to have known Mr Andre Brandt, formerly a senior manager at Sanlam, and who was a director of Sharemax. He describes Brandt as a “respected” senior manager.

[21] Respondent was aware that Sharemax was licensed with the FSB as a fully accredited FSP. Further that they were out performing the markets in a negative period and respondent was of the view that he had no reason to believe that it was a bad option for any investor at that time.

[22] Respondent was impressed that Sharemax had syndicated more than R4 billion worth of projects. Respondent “really believed in this product” and even advised his son to invest in it.

[23] I find that respondents reasons for recommending Sharemax, at that time, to be entirely inadequate. He does not appear to have had any reasonable level of knowledge as to the Sharemax model and, most importantly, did not have an appreciation for the risks in the investment. Respondent does state that he pointed out the risks in the investment to complainant, but fails to state exactly what risks were pointed out. Nor did respondent keep an independent record of advice wherein he details the risks that were drawn to complainant’s attention before she made the decision to invest.

**License Status**

[24] Respondent was not licensed in his own right to market the Sharemax product. He acted as a representative of USSA in terms of Section 13 of the Act. This office must then accept that USSA provided respondent with the necessary training and supervision to market this investment. I must consequently accept that respondent was well aware of the fact that this was a risky investment where one could potentially lose one's capital. He would also have known that neither returns nor investments nor the capital was guaranteed. As I will point out below, the disclosure documents presented by respondent as well as the prospectus state that this is a high-risk investment.

[25] Respondent tries to distance himself from the fact that the investment was high risk and not suitable for complainant by pointing out that the latter was due to marry a wealthy man and that her investment in Sharemax was only a small part of her available funds. It just turned out that shortly after advising complainant to invest in Sharemax, her fiancé died in a motor vehicle accident. Moreover, her remaining policies were very modest and would not have provided her with sufficient funds to maintain herself. In short, it cannot be disputed that complainant was of very modest means, the value of her policies is clearly consistent with a person of modest means, and she was not in a position to lose her capital. Although I accept that complainant wanted a higher return on her funds, she was not an aggressive investor. Her circumstances are consistent with her being a conservative investor with no appetite for risk. Her choice of investments up to that time is consistent with this. Respondent provides no evidence nor any adequate explanation as to why the Sharemax investment was suitable for complainant.

**Complainant's investment**

[26] Respondent states that he told complainant that as a USSA representative he was not allowed to market any other product similar to or equivalent to Sharemax. Complainant

was happy to invest in Sharemax. Respondent adds that she signed all relevant documents including the application form which was attached to the prospectus, copies of all the documents were delivered to this office. As I already pointed out, in advising complainant, respondent did not provide her with alternative products. He was at that time employed by Momentum and could easily have recommended products from Momentum.

[27] When complainant made her existing investments fully paid up, she received correspondence from each service provider for each policy about the impact it could have on her future situation. Respondent concludes by stating; “she was persistent we go ahead”. It is noteworthy that respondent provided financial advice, culminating in the Sharemax investment, from March 2009 to August 2009. The time was consumed by the process in cancelling existing policies in order to release funds.

[28] Although respondent discloses that no policies were surrendered or cancelled, the funds complainant invested in Sharemax came from surrendering some policies and the rest came from a savings account. Respondent does not dispute this. Besides it is not in dispute that complainant’s other policies were made paid up so that her funds became available for investment into Sharemax. Effectively then, the Sharemax product was a replacement product as contemplated in Section 8 (1) (d) of The Code. Apart from some correspondence from insurance companies stating how the benefits will be calculated, post being made paid up, there is no evidence that respondent complied with Section 8 (1) (d) and Section 9 (1) (d) of The Code.

**Media reports**

[29] A matter of some concern is the question of media reports. On respondent’s own version he was a very keen follower of Sharemax, having sold their products from about 2000 and he was impressed with their record. Naturally one would then expect him to take a keen

interest in media reports about Sharemax. Respondent admits that he saw “articles about Sharemax” in the press. He does not say anything about these articles but conveniently points out that he noticed them after complainant made her investments in Sharemax. Respondent advised complainant to make the investment in August 2009. At this time articles, questioning Sharemax, were already appearing in the media. In fact, articles calling into question the Sharemax model began appearing almost a year before in September 2008. A further investment for R10 000 was also made in Sharemax in April 2010, by which time one could hardly avoid the articles appearing in the media. As an ardent follower of Sharemax, respondent must have noticed and read them. As a responsible FSP, he had a duty to disclose this to his client. He did not, instead he encouraged her to make the investments well knowing that there was a cloud hanging over Sharemax. We know that in less than a year later Sharemax stopped making payments to investors and collapsed. For respondent not to draw complainant’s attention to the red flags appearing in the media and to advise her to invest was an act of recklessness. On his own version, respondent drew complainant’s attention to the risks in the investment, yet failed to tell her about the negative reporting in the media. Had complainant read these articles, she most certainly would have questioned respondent’s advice to invest in Sharemax.

[30] The Code obliges respondent to make full and frank disclosure of all available information regarding the investment. Respondent failed to comply to the detriment of his client who had placed her trust in him.

**Disclosure of Risk**

[31] A reasonably competent FSP, at the time of providing financial advice to client, can be expected to do the following:

a) ensure that he read and understood the Code;

b) understands that he is obliged to comply with the code in providing financial advice;

c) understands the nature of the financial product/s he is recommending to client;

d) understands the product so that he is in a position to explain it to client in plain language;

e) accepts that he is obliged to make a full and frank disclosure of all the available information about the product;

f) understands that he is obliged to ensure that his client will be in a position to make an informed decision; and

g) accepts that he must recommend a product that is suitable for client bearing in mind the latter's financial circumstances and tolerance for risk.

[32] Respondent states that he explained the risks in the Sharemax product to complainant, however he is extremely vague about the details. There is no record of advice that documents the risks explained to complainant.

[33] Respondents conduct in not explaining the risks is exacerbated by the fact that he had received training in the product from USSA and had even read and understood the prospectus. Yet he failed to tell complainant the following:

a) Neither her capital nor her monthly returns were guaranteed;

b) That the investment was considered capital risk;

c) That in fact she was not investing in property, Sharemax did not own any property and the shopping mall was still being built;

d) Her funds were not going to enjoy the safety of a trust account, but were going to be paid out to the promoter who could use it at their discretion;

e) That her funds were being lent to a developer to construct the building and that the loan was not subject to any security;

f) That Sharemax had no independent financial resources from which to pay agents commission and interest on the capital; and

g) That her interest was going to be paid from her own capital and from the investments of other investors.

h) This office wrote a letter to respondent requesting an explanation as to how he handled the above information when providing advice and whether or not he explained the peculiar risks in this product. Respondent did not answer the questions.

i) None of the above was a secret, this information appears in the prospectus and was available to respondent at the time when he gave complainant advice to invest. Respondent admits to have read the prospectus. There can be no doubt that had this information been disclosed to complainant, she would not have invested. Respondent failed to comply with the Code and negligently advised complainant to invest her modest savings in Sharemax.

**The Disclosure Document**

[34] USSA provided respondent with a "disclosure document", which had to be signed by complainant after respondent explained its contents to her. This document, significantly, sets out the disadvantages and risks associated with the product. It also informs the investor that as a USSA representative, respondent was only authorised to market Sharemax and no other equivalent product. I must assume that respondent presented the "Disclosure Document" to complainant for her signature as part of the application procedure. Respondent was trained to do so.

[35] What caused concern is that amongst the documents received from respondent was one such USSA disclosure document. This document is dated 17 August 2010 and it is for an investment in Sharemax The Villa for R37000. What is startling is that it means that

respondent was still selling the Sharemax product after the Collapse of Sharemax had already begun (payments stopped in July 2010). This was extremely reckless of respondent.

[36] The risks and warnings in the USSA disclosure documents are as follows:

a) That even though the representative may provide advice, the ultimate decision to invest rests solely with the investor;

b) There is a risk that capital and income could not materialise;

c) The ability to transfer the shares and debentures is restricted by the absence of a market for those shares;

d) The company is newly formed without any trading history which can be used to evaluate the likely performance of the product supplier and its ability to achieve its objectives;

e) In cases where loan finance is advanced to a developer, there is a risk that the developer may default on its obligations or produce insufficient profits to make payments of returns or capital or other amounts due to the product supplier;

f) There is a "substantial risk" that the investor may not be able to sell her shares/debentures should the investor chose to do so in future;

g) The investor declares that they understand that they must take "particular care" to consider whether the product selected is appropriate to the investor's needs, objectives and circumstances;

h) The repayment of capital and income is not guaranteed. The performance of the property syndication investment is not guaranteed; and

i) The units/shares are unlisted and should be considered as a risk capital investment.

The above warnings are repeated from the prospectus. Surely, having read and understood these risks, there was a duty at common law, and an obligation in terms of the Code, for respondent to make a full and frank disclosure to his client, at the time of recommending this product.

[37] I also question the fact that, having understood that this was a high-risk investment, what motivated respondent to deem this a suitable investment for complainant? How was a recommendation to invest in such a high-risk investment in the best interests of complainant? Despite an invitation to do so respondent provided no rational explanation for this.

## E. THE LEGAL FRAMEWORK

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

a) The provisions of the Act, in particular section 16 (1) (a);

b) The provisions of the Code, in particular sections 2, 3, 7 and 8;

c) The common law relating to delictual liability; and

d) The common law relating to the contractual relationship between the parties.

## F. THE ISSUES

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

a) Did Respondent, in advising his client, conduct himself in terms of the General Code, in particular section 2; and

b) Did the Respondent actually comply with the provisions of the following sections of the Code;

Section 3 (1) (a) (i) and (iii) ; Section 7 (1) (a); Section 8 (1) (a) and (c) and Section 8 (2).

c) Did respondent act in breach of his contract with Complainant; and

d) Did Complainant suffer loss and if so, what was the cause of the loss and the quantum thereof.

## G. APPLICATION OF LAW

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

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

b) Respondent failed to act in the interests of his client and by his conduct compromised the integrity of the financial services industry. Respondent contravened section 2 of The Code;

c) Respondent failed to provide full and frank disclosure of all the material information about the Sharemax product;

d) Respondent failed to enable complainant to make an informed decision. Respondent contravened section 7 (1) (a) of The Code; and

e) Respondent failed to seek relevant information from complainant and failed to provide appropriate advice. Respondent failed to identify a product that was appropriate to complainant's risk profile and financial needs. Respondent contravened section 8 (1) (a), (b) and (c) of The Code.

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

[42] Further, this office as well as the Board of Appeal have consistently found that where a client invests in a financial product pursuant to financial advice provided by an FSP, there existed a contract between FSP and client. It is an express, alternatively implied term of the contract that Respondent, in carrying out his obligations, will comply with the provisions of the Act and The Code. For reasons already stated, respondent was in breach of this term. A consequence of this breach was the loss of complainant's capital.

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

a) did the respondent comply with his legal duties towards the client; and

b) whether in terms thereof the respondent acted wrongfully and negligently.

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

a) Carried out diligent research to become familiar with the nature of the Sharemax product he intended to sell, respondent received training in the product from USSA, but failed to explain it to complainant;

b) Would have found out that The Villa promotion was completely different to all the other property syndications Sharemax had promoted in the past;

c) As a basic step he was required to read and understand the prospectus and the annexures thereto and explain it to complainant in plain language;

d) Made a point of understanding how Sharemax intended to pay his commission and investors returns bearing in mind that the latter owned no assets and enjoyed no trading history and did not have any independent means of making these payments

(these facts are stated in the prospectus). Significantly, respondent had a duty to explain this to complainant;

e) Would have noticed that contrary to what was initially stated in the prospectus, investor funds were not to be kept in trust but were paid out to the developer at the discretion of the promoter. This too is stated in the prospectus and had to be explained to complainant;

f) Respondent knew that investor funds were going to be lent to the developer at an interest rate of 14% and that there was no security for the loan. This was stated in the prospectus and he was under a duty to inform complainant about this;

g) Would have called for and read the Sale of Business Agreement between the promoter and the developer (the agreement is in the schedules and annexures to the prospectus). Had he done so respondent would also have found out that 3% of the investor's capital was being paid out as "agents commission" and that was even before the money was lent to the developer, 10% was deducted by the promoter as administrative fees. The developer then paid the promoter 14% interest on the loan; a further 14% taken out of the capital. A reasonably competent FSP would have worked out that after 27% of the capital was deducted, investors were still going to be paid 12% interest on 100% of their capital. This was certainly not sustainable. These facts are stated in the prospectus and Respondent failed to inform complainant of this;

h) Would have noticed that the shares will not be easy to dispose of, the promoter offered no assistance in disposing of the shares and the onus was placed on the investor to find a buyer (also stated in the prospectus).

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

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

[46] Respondent must be judged by the standard of a reasonably competent FSP in the same circumstances. Then the inquiry must progress to the next question: would a reasonably competent FSP have advised complainant differently. It is overwhelmingly clear that a reasonably competent FSP would have read and understood the prospectus and would not have advised a 51-year-old, about to retire person, to invest her pension funds in a manifestly high-risk investment where there was a prospect of losing all the capital. The SCA in Durr v ABSA Bank, Schutz JA stated as follows:

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

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

Respondent was the factual and legal cause of complainant's loss.

[47] A reasonably competent FSP, at the time of providing financial advice to client, can be expected to do the following:

a) ensure that he read and understood the Code;

b) understand that he is obliged to comply with the code in providing financial advice;

c) understand the nature of the financial product/s he is recommending to client;

d) understand the product so that he is in a position to explain it to client in plain language;

e) accept that he is obliged to make a full and frank disclosure of all the available information about the product;

f) understand that he is obliged to ensure that his client will be in a position to make an informed decision; and

g) accept that he must recommend a product that is suitable for client bearing in mind the latter's financial circumstances and tolerance for risk.

This amounts to the general level of skill and diligence possessed by licensed FSPs.

h) Accordingly, and in the circumstances, the respondent was under a legal duty of care to comply with his obligations. An omission to comply, in the circumstances, amounts to a negligent breach of the duty of care. A reasonably competent FSP, at the time of providing advice, should reasonably be expected to foresee that in the event of a breach of the aforesaid legal duty of care client will suffer harm. That harm will be the possible loss of client's capital. The precise or exact manner in which the harm occurred need not be foreseeable, the general manner of its occurrence had to be reasonably foreseeable. For example, advice to invest in a risky investment must result in a reasonable foreseeability that the investment could be lost in the near future. It is not a question of performance of the product but the realisation of existing risks in the product. The reasonable foreseeability must become even more clear where the product provider actually warns the FSP of the risks in the product. As in this matter, the prospectus and disclosure documents stated the risks in the

Sharemax investment. The respondent was aware of these risks; but nevertheless, advised complainant to invest her funds.

[48] Respondent's conduct fell short of a reasonably competent FSP and Respondent was the factual and legal cause of complainant's loss.

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

I refer to the following decisions:

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

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

ATWEALTH (PTY) LTD AND OTHERS v KERNICK AND OTHERS 2019 (4) SA 420 (SCA) at p529

## H. QUANTUM

[49] Respondent invested R141 000 in The Villa prospectus 16 and R47 782 in The Villa prospectus 20, making up a total capital investment of R188 782. Respondent is liable for complainant's loss of capital.

## I. THE ORDER

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

1. The complaint is upheld;

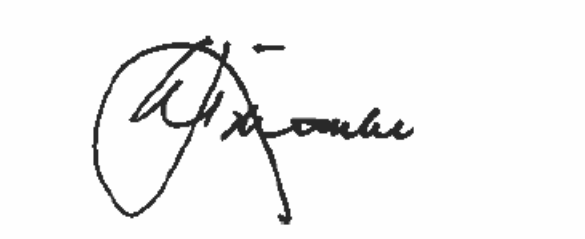
1.1 Respondent is ordered to pay complainant an amount of R188 782 in respect of The Villa investment;

1.2 Interest is payable at 7,75% per annum on each capital amount from a date 14 days from service of this order to date of payment.

1.3 Once the payment is made as ordered, the complainant is to cede her rights in respect of any further claims to these investments to the respondent.

2. Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

**DATED AT PRETORIA ON THIS THE 14th DAY OF OCTOBER 2020.**



_____

**ADV NONKU TSHOMBE**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**