THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBERS: FAIS 06984/ 11-12/ KZN 1

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In the matter between:

JANE ROSEMARY TODD	**First Complainant**
ROSEMARY ALICE DENNING	**Second complainant**

AND

ALBE HAASBROEK SOLUTIONS CC	**First Respondent**
ALBE HAASBROEK	**Second Respondent**

DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, (ACT 37 OF 2002), (the Act)

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A. INTRODUCTION

[1] The first and second complainants are daughter and mother respectively. They, together, filed a complaint against respondents arising out of the latter's advice to them to invest in Sharemax property syndications. Although there are two separate complaints, it will be convenient to deal with them in a single determination. Both complaints are against the same respondents and the facts are substantially the same. In this determination I will refer to the first and second complainants as "complainants" unless the context requires me to mention one or the other.

[2] The first respondent is a licensed FSP with FSP No 8154. Second respondent is the owner of the members interest in the first respondent and is also the key individual. Second respondent responded to both complaints and, again, I consider it convenient to refer to them as "the respondents".

[3] The party's personal information, including addresses, are on record in this office.

[4] Complainants used the services of respondents over an extended period of time. Second respondent was their financial services provider (FSP). The relationship soured and resulted in these complaints after respondents advised the complainants to make investments in Sharemax property syndications.

B. THE COMPLAINTS

[5] The complaints are against respondents and the principal complaint is that respondents advised complainants to invest in financial products that were entirely unsuitable for them, bearing in mind their financial needs and tolerance for risk. Complainants have lost their capital and believe the loss was caused by respondents' inappropriate financial advice.

[6] It is undisputed that complainants made the following Sharemax investments on the advice of respondent:

a) First complainant invested R100 000 in 2006 in Benoni Hyper; and R62 000 in 2008 in Country View Retirement Village;

b) Second complainant invested R80 000 in 2005 in The Village; R44 000 in Magalieskruin in 2005 and R100 000 in 2007 in Rivonia Square.

In respect of all five investments, notwithstanding that five years had lapsed, complainants did not receive their respective investments plus the promised interest or growth. It is clear that it is unlikely that complainants will recover any of their invested funds.

[7] I find it convenient to quote what first complainant stated in the opening paragraph of her complaint:

"I believe myself and my mother, were sold Sharemax investments which were not suited to our needs whatsoever, in fact, absolutely and completely unsuitable. Nor were the investments explained to us accurately."

[8] Complainants explain that respondent was their FSP over a period of 5 to 6 years. He had always invested their funds in "safe funds" as he knew that they did not want to risk losing money but expected their funds to "grow safely and gradually". Respondent was aware that some money represented inheritance from family members. He also knew that first complainant's father gave her funds for her sons' education. As for second complainant, she feared that she might out live her available funds. At all times, their investment goal was based "*on preservation of funds".* Complainants are certain that respondent was aware of this. It must be said that in his response, respondent did not dispute this.

[9] According to complainants, respondent visited them at their homes and told them that these were “fantastic investments” and that they will be “guaranteed to receive their lump sum after five years” plus interest of 18,5 % in respect of Benoni Hyper. Respondent advised that the funds were not liquid and that heavy penalties will apply if the funds were withdrawn before the five-year period. Complainants understood this and had no intention to withdraw the funds before the investment period of five years expired.

[10] Respondent presented the prospectus and referred to various pages whilst giving an explanation of the important facts about the investment. Complainants state that they did not read the prospectus; but would not have understood it had they attempted to read it. Complainants placed their trust in respondent to choose the right investment for them and to explain it to them. Respondent pointed to the impressive “projected growth” and it all appeared to be sound. First complainant states: “*Mr Haasbroek is qualified and paid to give appropriate advice in the best interest of his clients.”*

[11] Complainants also complain that respondent failed to draw their attention to the downside of the investments. The following was not drawn to their attention:

a) That this was a high-risk investment;

b) That they will have to sell their shares to a third party after five years in order to get their capital back;

c) That, in respect of Country View Retirement Village, first complainant was not investing in a “Growth Plan” and that she was buying a “Debt” and not an asset; and

d) That the projections had no solid basis as there was no operating or trading history.

Complainants point out that had respondent disclosed the above, they would not have invested. They state that there is no prospect that anyone will want to purchase their

shares nor is there any prospect that Frontier Asset Management will pay back the capital. Their capital is effectively lost.

[12] Complainants submit that the Sharemax investment had been questioned for a long time, yet respondent saw this high-risk investment as being suitable for investors with no tolerance for risk.

[13] Complainants state that respondent was wrong in selling Sharemax to them and believe that his advice was not accurate. They question why he made the decision to invest their funds in Sharemax when his own investment risk analysis of complainants indicated that the investment was not suitable for them.

[14] Complainants complain as follows: *"Many financial Advisers smelt a rat right from the start as the commission was unrealistically high. But Mr Haasbroek did not see it that way. Even back in 2006 Deon Basson alerted the world to possible illegal activity. Two of our investments were sold in 2007 and 2008. Any due diligence carried out into a Sharemax investment after 2006 should surely have revealed that something was not, quite right?"*

[15] After the complaint was delivered to respondent, he responded in writing and the response was forwarded to complainants. I intend to deal with their comments here before I refer to respondents' response.

[16] Complainants point out that respondent did not provide any risk analysis for first complainant's investment in Benoni Hyper in 2006; nor did he provide a risk analysis for second complainant's investments in Sharemax Magalieskruin Holdings Limited in 2005. The point being made is that complainants wished to see how respondent deemed

Sharemax investments to be suitable for them, bearing in mind that they had no appetite for risk. In fact, complainants challenged respondent to produce his record of advice in respect of all five Sharemax investments. It is not in dispute that respondents were unable to do so.

[17] Respondent supplied certain disclosure documents signed by complainants. These are USSA documents and complainants state the following:

a) Respondent did not explain who USSA are and what their role was;

b) Respondent requested them to sign the documents without giving them an opportunity to read and understand them first;

c) Complainants agreed that they should have read these documents first, but claim that they trusted respondent and signed as instructed; and

d) Complainants were never given a copy of the disclosure documents.

The significance of the disclosure documents is dealt with below.

[18] Respondent pointed out that at some point first complainant was employed by him. The suggestion was that there was some motivation in this for the complaint. Complainant denies this and states that her employment with respondent was entirely irrelevant to the complaints.

[19] Having read respondent's response, complainants submit that he still fails to explain why he found the Sharemax investments to be suitable. To illustrate the point, first complainant refers to her investment in Country View Retirement Home and shows that she was not actually investing in property and that nothing had been actually built, as represented to her by respondent. She is also disturbed by the fact that Sharemax actually used the funds

raised from investors in Country View to fund a Sharemax rescue plan. All respondent can say is that he had no control over what the directors of Sharemax were doing.

[20] Respondent, offered as one reason for advising complainants to invest in Sharemax that it was to provide them with a more diversified portfolio. However, whilst complainants accept the concept of diversification, they still did not receive an explanation as to why, bearing in mind the diverse options available on the market, respondents chose to advise investing in a high-risk investment such as Sharemax. Complainants state; "*we wish to know what his motivation was to recommend high risk, unlisted property syndications over other comparable but more secure, maybe listed products with similar returns, less costs and risk and easier liquidity after five years?"*

[21] Complainants noted that respondent admits to selling them these products as five-year plans. However, respondent failed to explain how, after five years, their capital was to be recovered. In particular, complainants are upset that respondent failed to explain that they would have to sell their shares in order to recover their lump sum plus interest. They observed that there was absolutely no discernible market for their Sharemax shares.

[22] Complainants' final comment is significant and I quote it as follows: *"I agree that Mr Haasbroek was not in control of the problems with Sharemax, that is not really our issue. What WAS in his control was the recommendation for us to invest in Sharemax in the first place which were risky, they did not disclose history, were not guaranteed and were precarious at best."*

C. RESPONDENTS' RESPONSE

[23] Having read the complaint, respondents presented their response. I deal with their submissions below and also make comment with regard to the substance of the complaint.

[24] Respondent begins by stating the following:

a) That second complainant had never complained about his advice and was not upset with him or his advice; and

b) That first complainant only complained after she lost her employment with him.

These responses are of no assistance as they are irrelevant to the substance of the complaint. First complainant states that her employment with respondent had nothing to do with the complaint. Second respondent certainly complained that due to respondent's advice she lost her capital and there is no prospects of recovering it.

[25] Respondent met first complainant in 2004 when he assisted her to extend the term of an investment she had with Momentum. He visited the Todd family on an annual basis and noted that they were looking for good consistent growth on investment. He states that their portfolio offered flexibility and liquidity. Respondent refers to a risk profile, which he attached, and denies that she was a "super conservative" investor. I will deal with this risk profile separately below.

[26] According to respondent he advised complainants to have what he describes as "The holistic investment plan"; which plan entailed the following:

a) First complainant needed to withdraw money from her investments to pay for her two sons' school fees. This was possible as most of her money was invested in Linked investment products and the money was liquid;

b) In “2006/11” first complainant phoned respondent to invest R100 000 she received from her father. At that stage she had R400 000 in flexible/liquid investments. She then also required an income from her investment as she was unemployed. Sharemax offered 9% and first respondent decided to invest R100 000 with Sharemax.

c) Respondent gave her a prospectus and disclosed his commission and explained that it was a 5-year investment. He also explained that the funds were not “easily accessible”. According to respondent she was happy with this and realised that she had liquidity in her investments.

d) Respondent states that he did not mention that income was guaranteed or that Sharemax guaranteed capital payments, nor did the prospectus make such guarantees. Respondent also did not make any promises not made in the prospectus.

[27] I took this into account but have the following difficulties:

a) Firstly, respondent does not say that he carried out a needs analysis and a risk analysis. We know that respondent failed to provide a record of advice, which he was obliged to keep and maintain;

b) Secondly, whilst he admits to giving complainant a prospectus, he is silent about whether or not complainant read and understood it; nor does he dispute complainant’s version that she did not read the prospectus. There is no record of advice indicating that he, at least, explained the prospectus in plain language to complainants, in respect of each investment;

c) Thirdly, although respondent maintained that he did not give guarantees, there is no record that he explained that Sharemax investments are high risk nor did he outline the risks in the investments so that complainants could understand them;

d) There is no record, not even on respondents' own version that he explained that the investment was in debt instruments and not in buildings nor any immovable assets, especially in respect of Country View;

e) There is also no record that he explained to complainants that the only way to recoup their capital was for them to sell their shares themselves;

f) Respondent has no record of advice regarding second complainant's investments. She invested in Rivonia Square Shopping Mall Holdings Limited, this investment is described as "*Unsecured Compulsorily Non-convertible Acknowledgement of Debt (Claim)".* Second complainant could not possibly know what this means. She thought she was investing in a shopping mall.

[28] Respondent then explains why he was of the opinion that Sharemax was the correct product for complainants:

a) It offered growing income returns, based on similar investments under their management over a period of 10 years;

b) Sharemax offered an investment underpinned by tangible assets with fairly predictable income streams, in this case shopping centres with good national and local tenants;

c) It offered long term capital appreciation; and

d) It offered diversification to what first complainant was already invested in.

In truth, Sharemax offered no such investments.

[29] To strengthen his point, respondent points out that first complainant did well out of the Benoni Hyper investment. He however admits that her interest rate dropped from the promised 18.5% to 7 %. He also states that first complainant did not lose her capital.

[30] Respondent's justification for his advice is vague and lacking in substance. He does not explain why he advised complainants to invest in what was a high-risk investment. There is no explanation as to why he did not offer other choices which could equally satisfy complainants' needs. But most importantly, he failed to explain why he did not inform his clients that capital will be difficult to recoup. In particular he did not explain that, after the 5-year period, the onus was on them to try to sell their shares, with no assistance from Sharemax or the broker, to a third party. Respondent also fails to deal with the fact that Sharemax shares are not marketable at all, nor does he deal with the fact that there is no prospect that Frontier Asset Management will pay back the capital plus interest. Complainants shares and debt instruments are worthless.

[31] It is also not true that Sharemax offered long term capital appreciation. Even if it did, there were risks that, if they materialised, the capital could be lost. As for the investment in Benoni Hyper, the promised return of 18.5% was exceptionally high and there is no evidence that respondent satisfied himself that this was sustainable over five years.

[32] Thereafter respondent deals with the investment in Country View Retirement Village. He justifies his advice as follows:

a) First complainant received R62 000 from her father and she had a choice of investing this money with one of her existing linked investment products or a growth plan with Sharemax;

b) Sharemax offered 18.5% simple interest growth plan. First complainant decided to invest with Sharemax. She was also influenced by the fact that her first Sharemax investment did so well;

c) Again, respondent gave her a prospectus and disclosed his commission and did not make any false promises. The prospectus also informed that this was a five-year plan.

[33] There are a number of problems with this explanation:

a) There is no evidence that respondent explained that this was not an investment in a retirement village. There was no retirement village. Investors were investing in a growth plan, there was no underlying asset/s.

b) Country View had no trading history and had no independent means from which to pay commissions and an extravagant 18.5% interest, payable monthly. Respondent, as a reasonably competent FSP, would have inquired into how Sharemax was able to make these payments including 6% broker commission. A reasonably competent FSP would have satisfied himself that Sharemax was not using investor funds to make these payments. It is worth noting that any reasonably competent FSP will know that he/she is duty bound by the Code to find out all the material information about an investment and to convey it to client; so that client can make an informed decision. There can be no doubt that Sharemax made interest and commission payments out of investors own funds; there was simply no other source of funds.

c) Nor is there any evidence to contradict complainants that respondent did not explain that after five years the onus will be on the investor to sell the shares in order to recoup their capital. Incidentally it is now not in dispute that neither Sharemax (finally liquidated) nor Frontier will repay the capital. The shares in Country View are equally of no value and complainant's capital can be considered to be lost.

d) Respondent also attempts to distance himself from the decision to invest by stating that it was complainant's decision to invest. This is patently not true. On respondent's own version, he introduced the Sharemax investments to complainants. Nor can it be disputed that complainants relied on his advice to agree to make the investments. He advised them these were "fantastic investments" and guaranteed return of their capital.

[34] Finally, respondent submits that the intervention of the SARB was something he could not have foreseen and it was completely out of his control. This is not a valid defence to the complaint. The exact cause of the Sharemax collapse is not relevant, nor is it an issue in the complaint. It is not in dispute that the investments were high risk, at the time that he sold them to complainants. A reasonably competent FSP, in the position of respondent, would have foreseen that the risk, inherent in the investment, could realise and cause loss to the investor. I will also show below that respondent was aware of the risks but nevertheless decided to persuade complainants to invest in Sharemax.

Risk Profile

[35] The question of complainants' risk profile became relevant and this office requested respondents record of his profiling of complainants. This was done after complainants pointed out that the documents supplied by respondent were actually not relevant to the investments in issue. Respondent was unable to find the relevant documents but submitted that he had carried out a risk analysis and found first complainant to be "moderate/aggressive" in 2007 and "moderate" in 2008. Respondent then concludes that this proved that the investment was within their risk profiles. There is no record, at all, regarding respondent's profiling of second complainant.

[36] Respondent states as follows: *"the greatest risk of Sharemax was that you as an investor did not have free access to your money, there was high costs involved in liquidating and you had to wait for someone to buy your shares".* What is significant is that respondent then relies on how Sharemax marketed their investments to the *brokers, such as himself.* He was informed by Sharemax that the investment was low risk, as you invest in instruments that was underpinned by tangible assets such as shopping centres and retirement villages and that the investment was secure, bond free, insured and offered reliable income from tenants in the centres. Sharemax also positioned the investments as ideal for the elderly in need of high yielding income flows. Respondent concludes that this was what first complainant needed.

[37] Respondent was requested to provide his records of advice regarding these investments. His response was that he was unable to find any documents but relies on the fact that his advice was orally made to complainants. He did, however, produce the USSA disclosure documents which he also relies on.

[38] Respondent also relies on the financial planning he conducted for complainants. He visited them every year since 2004 and on each occasion, he prepared an investment portfolio, copies were provided. He states that every year complainants were "*very happy with the advice I gave them*". On considering the portfolios it emerged that complainants' funds were invested in diversified investments including guaranteed funds, offshore funds, money market funds, balanced funds, equity and income funds. The investments were with Momentum Wealth and the whole family portfolio, in November 2006, was worth a modest R385 332.80.

[39] Complainants expressed dissatisfaction with fluctuations in the stock markets but; *"wanted their investments to grow".* Respondent states that he "*honestly believed"* that "*Sharemax property investments*" was of good value and further diversified their portfolio.

[40] Respondent concludes by stating that due to legislative changes Sharemax "*could no longer operate under the old structure"* he then expresses regret that complainants cannot get their capital back after five years. However, he is hopeful because Sharemax was busy with a recovery plan.

[41] I also considered the "Risk Tolerance" questionnaire attached to respondents' response. According to respondent's analysis first complainant was a "Moderate" investor. This profile informed him that Sharemax was a suitable investment for her.

[42] Having considered the response, I make the following observations:

a) By all accounts, complainants were of modest means and were very concerned about capital preservation. It cannot be disputed that they were not in a position to risk any part of their capital. Respondent knew them and advised them over a period of many years. They had modest investments in conservative, safe products with Momentum Wealth. Respondent does not dispute this.

b) The questionnaire is not an adequate assessment of risk. Filling out a form does not accurately provide dependable risk profiles. The questionnaires are particularly unhelpful as they are often based on a points system weighted towards the investor being more aggressive. Respondents questionnaire is one such document. Respondent had to look at the person, besides, respondent does not explain what "moderate" means, nor is this explained in the document. What is perfectly clear from the personal and financial information provided by complainants is that they

are conservative investors with no tolerance for risk. Sharemax, to the knowledge of respondent, was regarded as risk capital investment, the prospectus states as much. This is not an investment for even “moderate” risk takers.

c) Respondent, being a highly qualified FSP, relied on the marketing information from the product provider. Surely, he should know that the information was mere marketing the authenticity of which he had to establish from his own inquiries. As it turned out, the Sharemax investments were not in property but in debt instruments. Neither were the investments underpinned by tangible assets. A good example is the Country View investment respondent sold to first complainant. It was merely a debt instrument and there was no underpinning asset. An illusion was created by Sharemax that a retirement Village was constructed, but there was no construction at all. Still respondent saw this as a suitable investment. Sharemax did position the investment as good for pensioners, on the basis of their extravagant interest of between 12.5% and 18.5%. Sharemax and their broker network specifically targeted the elderly. They were vulnerable people who did not understand finance and were merely lured by the prospect of a better income. That their capital was immediately at risk was never explained to them. The same happened here.

d) Respondent admits that complainants cannot get their capital back. We know that the much vaunted Sharemax rescue plan came to naught. The significance of this is that this risk was present when the investment was made and respondent did not warn complainants about it. This was negligent conduct.

e) The Sharemax prospectuses also made it plain that investors funds enjoyed no security. Their funds were not going to be held in trust, as promised, but was to be paid out to the promoter to deal with it at their discretion. Neither was there any intention on the part of Sharemax to comply with Notice 459, thereby depriving

investors of security for their funds. I must assume that respondent was aware of this as he claims to have read and understood the prospectuses. It is also not in dispute that these risks were not explained to complainants.

f) Respondent is unable to provide a reasonable explanation for his advice to invest in a patently high-risk investment. Respondents conduct is negligent when one considers that he advised complainants that this was a low risk investment whilst the prospectus informs that this was a high-risk investment. Respondent just never explained this.

g) Finally, complainants question respondent's conduct in not alerting them to the negative media reports about Sharemax which appeared regularly in the media since 2006. Respondent just ignored this accusation and remained silent about it. There can be no doubt that he had read these media reports, they were quite prevalent in the print and electronic media. Respondent had a duty, in terms of the Code, to make full and frank disclosure of all the material facts to his clients. He failed to do so.

Disclosure Documents

[43] It is significant and relevant that respondent produced two USSA Disclosure Documents which were signed by first complainant in respect of her two investments in Sharemax. These documents were issued by USSA to all brokers marketing Sharemax products and all investors were expected to sign them. What elicits comment is that these documents are not user-friendly as they are written in the smallest available font size (the typical small print) with very small spacing. Not the type of document most people, especially elderly people, will be inclined to read. First complainant states that respondent placed the documents in front of her and requested her to sign. She did not read the documents but

merely trusted respondent. What is common cause is that after signature, respondent did not leave a copy with her. Complainant has now read the document and is shocked to find that the disclosure actually warns the investor that this was a high-risk investment. On the probabilities respondent did not leave a copy with complainant for fear that she might read it and realise she was poorly advised.

[44] The disclosure warns that the investment is not liquid and difficult to withdraw and that there is no market for the shares. It tells the reader that the investment is in debt instruments and "*there is a risk that both the capital and the income could not materialise."* The document discloses that Sharemax is a "*newly formed company without any trading history which can be used to evaluate the likely performance of the product supplier and its ability to achieve its objectives."*

[45] The prospectus clearly states that "*The investor carries all investment risks"* and goes on to set out the various possible risks in the investment, such as developer default and declines in the property market. However, and of substantial significance, is a paragraph in the document which immediately precedes the investor's signature, the following appears: "*ADVICE NOTIFICATION/RECORD OF ADVICE/RISK DISCLOSURES: I, THE INVESTOR HEREBY ACKNOWLEDGE, UNDERSTAND AND CONFIRM THAT:"* then follows, in very small print, further warnings and disclaimers of any liability. For purposes of this determination, I quote the following;

"*The repayment of the capital and or income is NOT GUARANTEED, UNLESS EXPLICITLY STATED IN THE PROSPECTUS THAT IT IS GUARANTEED. The performance of the property syndication investment is NOT GUARANTEED. The units/shares of the property syndication investment are unlisted and should be considered*

as a risk capital investment." Note that the lack of guarantees is stated in upper casing to emphasise it. The prospectus also gave no guarantees.

[46] There can be no more explicit warning, that this is a high-risk investment. Yet respondent chose not to draw his clients' attention to this and conveniently took the document away after it was signed. There can be no doubt that complainants' version must be accepted that, had they been aware of these warnings, they would not have invested. Respondent was invited to respond to this, but gave no explanation. The only reasonable finding must be that respondent was in flagrant breach of The Code and his conduct was nothing short of negligent.

[47] It certainly does not assist respondent to blame the failure of the investments on the intervention of the SARB. He already sold complainants a high-risk investment at the point of sale. He could reasonably foresee that any one of the many risks inherent in the investment could materialise, he was not expected to foresee the exact nature of the risk. His negligence can also not be based on any finding on the legality or otherwise of the Sharemax investment.

Respondent's Licence Status

[48] It is relevant that respondents, in their own right, were licensed to market the Sharemax product. They were licensed under categories 1.08 and 1.10. This means that respondent was well qualified to market debt instruments. Further, second respondent is a CFP (charted financial services provider). He is, without doubt, highly qualified. He must therefore be measured by the conduct of a reasonably competent FSP with similar qualifications.

D. THE ISSUES

[49] Having considered the facts as stated above, the issues here are the following: in giving complainants financial advice:

a) Did respondents comply with the provisions of the Act and Code?

b) If respondents failed to comply, was their conduct and advice, in the circumstances, negligent?

c) If respondents conduct was negligent, did that negligence result in loss to complainant?

[50] By all accounts, the Sharemax investment was high risk. It cannot be disputed that respondent advised complainants to invest in these investments. Nor is it in dispute that these were high risk investments. The issues then are:

a) Were these investments suitable for complainants' needs?

b) What motivated respondent to give this advice?

c) Did respondent place complainants in a position to make informed decision? and

d) Was there negligence on the part of respondent in providing the advice?

For purposes of this determination, a finding need not be made that Sharemax was a "Legal or illegal investment". The legality of the investment is not the test neither is it an issue; it is the suitability of the investment for complainants and their financial circumstances that is in issue.

Negligence

[51] 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.

[52] Respondent states that he explained the risks in the Sharemax product to complainants, however the only risk explained appears to be that the investment was not liquid. That was not good enough. The disclosure documents do warn against a number of risks in the investment, but respondent did not draw attention to it and did not give complainants an opportunity to read and understand it.

[53] Respondents conduct in not explaining the risks is exacerbated by the fact that he had received training in the products and had even read and understood the prospectus, this in addition to his high qualifications. Yet he failed to tell complainants the following:

a) Neither their capital nor monthly income were guaranteed;

b) That the investments were considered risk capital;

c) That in fact they were not investing in property, Sharemax did not own any property and that the retirement village was not built;

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

e) That their funds were being lent to a developer to construct the building, before the promoter took transfer of the property and that the loan was not subject to any security;

f) That Sharemax was not going to comply with the requirements of Notice 459;

g) That Sharemax had no independent financial resources from which to pay agents' commissions and interest on the capital to investors; and

h) That their interest was going to be effectively paid from their own capital and from the investments of other investors.

[54] None of the above was a secret, this information appears in the prospectus and was available to respondent at the time when he gave complainants advice to invest. Respondent admits to having read the prospectus. There can be no doubt that had this information been disclosed to complainants, they would not have invested. Respondent failed to comply with the Code and negligently advised complainants to invest their modest funds in Sharemax.

Application of Law

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

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

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

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

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

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

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

[57] Further, this office as well as the erstwhile FSB Appeal Board (now the Financial Services Tribunal) has consistently found that there existed a contract between FSP and client. It was an express, alternatively implied term of the contract that Second Respondent, in carrying out his obligations, will comply with the provisions of the Act and The Code. For reasons already stated, respondents were in breach of this term. A consequence of this breach was the loss of complainants' capital.

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

a) did respondents comply with their legal duties towards client; and

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

[59] 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;

b) Would have found out that the investment in Country View was an investment in debt instruments and that there was no underlying asset;

c) As a basic step second respondent was expected to read and understand the prospectus and the annexures thereto and explain it to complainants 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 and in the disclosure documents). Significantly, respondent had a duty to explain this to complainants;

e) Would have noticed that contrary to what was initially stated in the prospectus, it then informs that investor funds will not be kept in trust but will be paid out to the developer at the discretion of the promoter (this too is stated in the prospectus), this had to be explained to complainants;

f) 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.

[60] 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 complainants of the right to make an informed decision.

[61] 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 complainants to invest their available 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."*

Respondents conduct fell short of this standard and was the factual and legal cause of complainant's loss.

[62] 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 investments. The second respondent was aware of these risks; but nevertheless, advised complainants to invest their funds.

[63] Second Respondent's conduct fell short of a reasonably competent FSP and respondent was the factual and legal cause of complainants' 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) – approved of the Castro judgement.

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

[64] For all of the reasons stated above, I find that respondents acted negligently and such negligence was the cause of complainant's loss.

E. THE ORDER

[65] The following order is made:

1. In respect of first complainant

   a) The complaint is upheld;

   b) The respondents are ordered to pay to First complainant, jointly and severally, an amount of R162 000;

   c) Interest on the amount of R162 000 at the rate of 7%, seven days from the date of this order to date of final payment.

2. In respect of second complainant

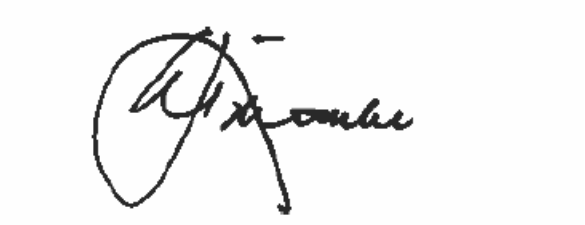
   d) The complaint is upheld;

   e) The respondents are ordered to pay to Second complainant, jointly and severally, an amount of R224 000;

   f) Interest on the amount of R224 000 at the rate of 7%, seven days from the date of this order to date of final payment.

3. 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 10th DAY OF FEBRUARY 2021.



ADV NONKU TSHOMBE

OMBUD FOR FINANCIAL SERVICES PROVIDERS