FAISOmbud
Office of the Ombud for Financial Services Providers

OUR REFERENCE: FAIS 06965/12-13/ FS 1

FAIS 06997/12-13/ FS 1

15 December 2017

ATTENTION: Mr Abraham Jacobus Gouws
Advice at Platfin CC

Per email: abgoubr@iafrica.com

Dear Mr Gouws

Mr Trevor Hattingh (complainant) v Advice at Platfin CC (respondent) and Mr Abraham Jacobus Gouws (second respondent). Recommendation in Terms of Section 27 (5) (c) of the FAIS ACT, (ACT 37 of 2002)

A. INTRODUCTION

1. On 29 November 2012, Mr Hattingh filed a complaint with this Office against Abraham Jacobus Gouws**, a sole proprietor then trading under the name and style of** Abe Gouws Makelaars. The complaint arose from failed investments made by complainant, on respondent's advice, into two public property syndication schemes, namely, The Villa Retail Park Holdings Limited [1]('The Villa Ltd"), promoted by Sharemax Investment (Pty) Ltd ("Sharemax") and Highveld Syndication 21 (HS 21) promoted by PIC Syndications (Pty) Limited[2] ("PIC" or Pickvest).

[1] Registration number 2008/017207/06
[2] registration number 2002/000736/07

Sussex Office Park, c/o Lynnwood and Sussex Avenue, Lynnwood, 0081
P O Box 74571, Lynnwood Ridge, 0040
Phone: (012) 762 5000 / (012) 470 9080; Fax: (012) 348 3447 / (012) 470 9097
www.faisombud.co.za

Delays in finalising this complaint

2. It is necessary to digress a little and explain the delays in finalizing this complaint in view of the Office's mandate to resolve complaints expeditiously. Sometime in September 2011, after the Office issued the *Barnes* determination[3], the respondent in that matter brought an urgent application to set it aside[4]. Before the fate of the application could be known, respondents sought an undertaking from this Office that it would not proceed to determine any other property syndication related complaints involving them.

3. Since no legal basis existed for respondent's demands, the Office continued to determine further property related complaints, to which respondents reacted with an urgent application for an interdict to stop the Office from filing the determinations in court, and issuing further determinations against them. The decision was finally delivered in July 2012. See in this regard *Deeb Risk v FAIS Ombud & Others*[5].

4. The Office continued to determine complaints involving property syndications after the High Court decision. However, in 2013, following the *Siegrist* and *Bekker* determinations[6] and the relevant appeal, a decision was taken by the Office to halt processing property syndication related complaints. The decision was not taken lightly, but was a precautionary and necessary risk management step, as the Office had, for the first time, sought to hold the directors of property syndication schemes liable for complainants' losses. The said appeal was finally decided in April 2015[7], after which the Office resumed (with due regard to the decision) to process complaints involving property syndications. As many as 2000 complaints had to be shelved pending the Appeals Board decision.

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3 See E Barnes v D Risk Insurance Consultants FAIS-06793-10/11 GP 1

4 Respondent claimed that section 27 of the FAIS Act was unconstitutional

5 Gauteng High Court Division, case number 50027/2014

6 See in this regard FAIS-00039-11/12 and FAIS-06661-10/11.

7 See in this regard the decision of the Appeals Board date 10 April 2015.

B. THE PARTIES

5. Complainant is Mr Trevor Hattingh, a semi-retired adult male whose full particulars are on file with this Office.

6. First respondent is Advice At Platfin CC, a close corporation duly incorporated in terms of South African law, with registration number (1993/017920/23). The first respondent is an authorised financial services provider (FSP) (licence number 11991,) with its principal place of business noted in the Regulator's records as Negotium Building, C/O De Kaap en Buiten Street, Welkom, 9459. The licence has been active since 13 October 2004. At the time the advice was provided the entity traded as Abe Gouws Makelaars.

7. Second respondent is Abraham Jacobus Gouws, an adult male, key individual and representative of the first respondent. The Regulator's records confirm his address to be the same as that of first respondent. At all times material hereto, second respondent rendered financial services to the complainant.

8. It appears from the Regulator's records that, since 27 January 2005, respondent was licensed to render financial services in connection with unlisted shares categorised as 1.8 (described in the FAIS Act as Securities and Instruments: Shares). However, respondent was never licenced in terms of category 1.10 (described in the FAIS Act as Securities and Instruments: Debentures and Securitised Debt). This means that respondent was never adequately licenced to render financial services with regards to The Villa syndication (refer to the attached correspondence.

9. I refer to the respondents collectively as "respondent". Where appropriate, I specify which respondent is being referred to.

C. THE COMPLAINT

10. Complainant approached respondent during June 2009 seeking advice on investing a sum of R1 000 000. The funds were, at that time, held in a fixed deposit with ABSA, and were earmarked for complainant's retirement. Complainant had also explained that he had previously sustained losses

of R360 000, and could not afford any further losses to his capital, and therefore sought assurance from respondent that he would not lose any money.

11. Complainant had suggested an investment into Allan Gray as he believed it to be a reputable company. Respondent subsequently provided complainant with quotations for both Allan Gray and Sharemax The Villa, and explained that the Sharemax investment was a 'better' option with a higher return. Complainant was however hesitant to place, in his words, '…all my eggs in one basket…' which is when respondent introduced complainant to PIC. Both investments and the circumstances surrounding their inception are expanded upon below.

First complaint: Sharemax The Villa Retail Park Holdings Limited

12. Respondent had explained to complainant that Sharemax was a good investment with a track record of 10 years, and that the prospectuses for this specific syndication i.e. The Villa were 'flying', and complainant could lose out if he hesitated. In this regard complainant was presented with a quotation that provided him an interest rate of 12.5% per annum for a period of 5 years.

13. When complainant questioned respondent as to how his capital of R500 000 would be returned to him, and how the income would be generated when the building was still in the process of being built, he was informed that a company by the name of SA Retail, whom it was claimed had bought most of the previous buildings from Sharemax, would purchase the building once completed. Whilst a period of 3 years was provided as the proposed completion date for the building, respondent confidently assured complainant that SA Retail would in all likelihood purchase the building within the next 18 months. To illustrate his point respondent mentioned The Bluff in Durban as an example, which it was claimed was sold at a 'huge profit' as a result of the effectiveness of the Sharemax model.

14. Just prior to concluding the transaction, complainant approached respondent with regards to all the negative reports and warnings about Sharemax which he referred to as being 'Geheimsinig' and reiterated once again his interest in Allan Gray. Respondent once again provided assurances that there would be no problems, and based on these assurances (which will be discussed in greater detail

in respondent's reply below) complainant, on 2 July 2009, deposited R500 000 into the account of Weavind & Weavind.

15. In August 2010, in the midst of the negative media reports, complainant requested a withdrawal from the investment only to be told by respondent that the reports were untrue and that his capital was safe. On 30 August 2010 no interest was received and all income from the investment ceased.

16. Complainant claims he was misled and avers that had respondent been totally honest with him he would not have been in this predicament.

Second Complainant: PIC Highveld Syndication 21

17. Respondent described the PIC syndication as the same type of investment as The Villa, the only difference being that the buildings had been completed, otherwise it would also provide him with a 12.5% annual return for a period of 5 years.

18. Complainant once again questioned whether this was a safe investment, and reiterated his concerns with regards to losing money. Respondent once again assured him that no problems could occur. As a result of the assurances provided by respondent, complainant deposited R500 000 into the account of Eugene Kruger on 2 July 2009.

19. During April 2011 the income complainant was receiving from PIC was reduced to 6% and despite assurances from respondent it never went back to the 12%.

20. The complainant had initially addressed both these matters with respondent, in accordance with Rule 5(b) of the Rules on Proceedings of the Office of the FAIS Ombud. Attempts to resolve the matter with respondent proved unsuccessful, and so complainant turned to this Office and requested that his capital be returned by respondent.

D. RESPONDENT'S VERSION

21. There is no record of this Office having received Respondent's response to the Rule 6 (b) letter of 10 December 2012.

E. INVESTIGATION

22. During June 2015, this Office sent notices[8] to the respondent in terms of section 27 (4) of the FAIS Act, (the Notice) informing respondent that the complaints had not been resolved and that the Office had intention to investigate the matter. The letters read (omitting for now words not material to the essence):

22.1 'Property syndications are high risk investments for a number of reasons, because they are structured as unlisted companies, and the basis upon which the properties are valued are never fully disclosed.

22.2 Investors such as complainant are at risk as unlisted shares and debentures are not readily marketable; the value is also not readily ascertainable, and should the company fail, this may result in the loss of the investor's entire investment.

22.3 Was your client properly appraised of these risks? Please provide evidence to this effect. Only information provided to your client at the time of advice will be acceptable. In other words, we are looking for a record of advice, which must have been provided to your client at the time of rendering the service.

22.4 The prospectuses of both the Villa Retail Park Holdings as well as Zambezi…… declare that the respective entities have never traded prior to the registration of the prospectus, have not made any profit whatsoever and are still under construction.

[8] Note that respondent received a Notice for each complaint on 24 and 28 June 2012 respectively.

22.5 In the circumstances, how did you expect the income to be paid, other than out of investors' money?

22.6 The prospectuses refer to the investment as being an unsecured subordinated interest rate acknowledgement of debt linked to a share, which share was in an entity still under construction.

22.7 Given the preceding paragraph please advise as to why you considered the investment to be anything less than an extremely risky venture, without any substance to its guarantee on interest payments?

22.8 Was your client properly apprised of these risks? Please provide evidence to this effect.

22.9 What information did you rely on to conclude that this investment was appropriate to your client's risk profile and financial needs? In this regard, your attention is drawn to the provisions of section 8 and 9 of the General Code.

23. Respondent was invited to substantiate his answers with documents compiled at the time of providing advice to his clients.

24. Respondent replied to the Section 27(4) Notices on 3 and 11 July 2015 respectively. His responses are summarised below:

Response: Section 27(4) Notice - Sharemax The Villa Retail Park Holdings Limited

24.1 Respondent questioned whether or not complainant's actions in laying a civil claim against him prohibited this Office from investigating this matter. Whilst a summons was issued against respondent, the summons was subsequently withdrawn, and the subject of the complaint was not pending in court proceedings prior to lodging this complaint.

24.2 Respondent claimed to have been acting under supervision as a representative of USSA at the time the transaction was concluded, and that the complaint should rather be directed to that entity.

24.3 Respondent claims to have not only explained the investment in detail, but that he had provided complainant with a copy of the prospectus. The complainant, it is claimed, kept the prospectus for two weeks before making the investment. Furthermore, the investment was only made after complainant had, together with respondent, met with Andre Brand, a director of Sharemax, and visited the construction site of The Villa. The meeting with Andre Brand is confirmed in the record of advice; however, it also records that complainant wanted a conservative investment and that he did not want to lose any capital. The client advice record provides no details of any disclosures made to complainant with regards to the nature of the investment, the risks involved or any other information to support not only why this investment was deemed to have been appropriate for his needs, but whether complainant was placed in a position to make an informed decision.

24.4 In response to complainant's concerns surrounding the warnings he had received in the media with regards to Sharemax, respondent, in an e-mail, replied as follows: (The following extract has been translated from the original Afrikaans, and only salient points have been highlighted.) "*The article has nothing to do with Sharemax's Zambezi syndication; Dividend Investments had marketed the existing portion of Zambezi to their clients. The Zambezi Retail Park is a new part of the centre that Sharemax is developing, and this development shall be completed by the end of the year* [2009]*, then it will also look good again for Dividend Investments as the new development is having a negative impact on the existing centre as a result of the access being affected by the new development. This is all just propaganda in an attempt to discredit Sharemax; in my opinion Deon Basson has a personal problem with Willie Botha, and how else do you explain why he has never written about PIC, Bluezone etc.? They all do the same business and in many aspects not as good as Sharemax, but there is never anything written about them. A company such as SA Retail would not have bought Sharemax properties for the last 10 years if it was not a good investment."*

24.5 With regards to the due diligence conducted, respondent claims to have attended training as a Sharemax broker, and that he had, together with Andre Brand, visited the construction site of The Villa. Respondent also claimed that property has always been regarded as a safe investment, as bricks, concrete and steel is a fixed asset.

This in itself proves that respondent had no understanding of the nature of the investment he was recommending to his clients. Respondent also pointed to the track record of Sharemax and the fact that The Villa was not a high-risk investment, but that it had been turned into one through the intervention of the Reserve Bank and the media.

Response: Section 27(4) Notice - PIC Highveld Syndication 21

24.6 Respondent once again referred to the civil action brought by complainant, which has been addressed above.

24.7 Respondent confirms that he believes this investment to be a low risk investment as the capital was backed by commercial property that was already trading and that the media reports at the time had also considered it to be a very good investment. The buy-back guarantee, backed by Mr Nic Georgio, was provided as further proof of the fact that the capital and income were guaranteed.

24.8 Respondent also referred to the class action undertaken by shareholders of PIC, and the fact that complainant is a member of this class action.

24.9 Respondent claims to have not only explained the investment in detail, but that he had provided complainant with a copy of the prospectus which he alleged, complainant had kept for a week and a half before making the investment. The 'Client Advice Record' provided is a carbon copy of the one completed for The Villa and as a result provides no details of any disclosures made to complainant with regards to the nature of the investment, the risks involved or any other information to support not only why this investment was deemed to

have been appropriate for his needs, but whether complainant was placed in a position to make an informed decision.

24.10 Once again the assertion is made that the investment did not fail, and that it was only because of the interference of the Reserve Bank that the structure had failed.

25. On his own version, respondent confirms that he rendered financial services to complainant, and had done so for many years. What cannot then be disputed is that, in rendering financial services to complainant, respondent had to align his conduct with the Code. The following sections of the Code are germane to this case:

a. Section 7 (1)(a), which calls upon providers other than direct marketers to provide "*a reasonable and appropriate general explanation* of *the nature and material terms of the relevant contract* or transaction to a client, *and generally make full and frank disclosure* of any information *that would reasonably be expected to enable the client to make an informed decision'*

b. Section 2, part II of the General Code of the Conduct (the Code) states that *"a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry"*.

c. Section 8 (1) (a) to (c) of the General Code states that:

"A provider other than a direct marketer, must, prior to providing a client with advice -

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

(b) conduct an analysis, for purposes of the advice, based on the information obtained;

(c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement…"

d. Section 8 (1) (d) of the General Code states that:

A provider other than a direct marketer, must, prior to providing a client with advice—

(d) where the financial product ("the replacement product") is to replace an existing financial product wholly or partially ("the terminated product") held by the client, fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement.

26. Section 8 (4) (b) states that where a client "*elects to conclude a transaction that differs from that recommended by the provider, or otherwise elects not to follow the advice furnished, or elects to receive more limited information or advice than the provider is able to provide, the provider must alert the client as soon as reasonably possible of the clear existence of any risk to the client, and must advise the client to take particular care to consider whether any product selected is appropriate to the client's needs, objectives and circumstances".*

27. The facts that have not been denied by respondent indicate that his client had instructed him that he could not afford to lose his capital. In his recommendations to complainant, respondent recommended the investments in PIC and Sharemax with the full understanding that his client had no capacity to absorb risk.

28. The paragraphs that follow demonstrate that respondent's advice was fundamentally flawed in that nothing in all the schemes guaranteed investor capital. If anything, the prospectuses of both the schemes into which complainant's funds were invested made it plain that the investments were far too risky, guaranteeing neither the capital nor the income. In that case, respondent had no basis to invest complainant's funds into the schemes; his recommendations were either a result of incompetence or lack of skill, in which case respondent was negligent. In the event respondent appreciated the magnitude of risk involved in the investments and nonetheless went ahead with his

recommendation, even though he could see that the investments were in violation of section 8 (1) (c) of the Code. Either way, respondent violated his duty to act with skill, care and diligence as provided for in section 2 of the General Code.

Highveld Syndication No. 21 Prospectus (HS 21)

Violations of Notice 459

29. I refer to the summary of HS 21 disclosure document annexed hereto and note the following.

29.1 Page 6 of the prospectus carries a risk warning which states that the shares are unlisted, thus the adviser will assist in the resale of his client's shares and that market related fees are payable by the seller. This would however appear to be in stark contrast to statements made on page 21 of the same prospectus which states that PIC Syndications (Pty) Ltd. (PIC) is not responsible to find a suitable buyer should the investor wish to sell his shares. It will be the sole responsibility of the investor to find a prospective buyer.

The statement does not accord with the requirements of Notice 459. According to the Notice, investors shall be advised that <u>there is substantial risk</u> in that investors <u>may not be able to sell their shares</u> should they wish to do so. In this regard, it is not <u>the function of the promoter to find a buyer</u> should the investor wish to sell[9]. There is no indication that respondent brought this complainant's attention. The guarantee of his capital was important to complainant and had this been adequately explained to him, he would not, in all probability, have accepted the recommendation.

29.2 Funds received will be deposited in the trust account of Eugene Kruger & Co Attorneys. The funds will be utilised to enable the syndication to take occupation of the properties. The funds will be drawn on the instruction of <u>PIC as per agreement between PIC and the</u>

9 Section 1 (b) (ii) and (iii)

investors. The unencumbered properties will be transferred into Highveld Syndication no 21, Ltd (HS 21 Ltd)[10].

Notice 459 states that investor funds shall be deposited into a registered trust account of a registered attorney or chartered accountant and shall be withdrawn only in the event of registration of transfer or upon underwriting by a disclosed underwriter.[11]

29.3 It is noted in paragraph 1 of page 40 of the prospectus that the Company, HS 21 Ltd, has never conducted any other business before the purchase of the properties noted on page 18 of the prospectus, on 1 August 2008.

30. The prospectus issued by Pickvest carried a clear message as to how the directors intended to deal with investors' funds which is contrary to the peremptory language used in Notice 459. The notice is clear; it calls for compliance in order to protect investors. That (from respondent's version) he did not notice the violation and went ahead with his recommendation, is negligence.

The Villa Ltd Prospectus

Violations of Notice 459

31. From the onset, paragraphs 4.3 of The Villa Ltd prospectus made it plain that the directors of Sharemax, who also were directors of all the other Sharemax companies involved in the prospectus, were not going to comply with Notice 459.

32. In this regard, the prospectus made provision for disbursing investors' funds to pay for the entire shareholding of The Villa Retail Shopping Investments (Pty) Ltd, (The Villa (Pty) Ltd), from Sharemax. There is no detail of the concomitant benefit for investors and neither is the full purchase price noted anywhere in the prospectus.

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[10] Page 17

[11] Section 2 (a) & Section 2 (b) Notice 459

33. The prospectus disclosed (in paragraph 4,3) that investor funds will be lent to the developer, Capicol 1 via The Villa (Pty) Ltd, a subsidiary of the group, Sharemax, well before registration of transfer of the immovable property into the name of the syndication vehicle.

34. The movement of the funds was illegal and a direct affront to Notice 459 (see Annexure A3, which contains a summary of section 2 (b) of the Notice) which is aimed at investor protection. The respondent, even in his answers to this office, says nothing about the infringement of the Notice.

Conflicting provisions of the prospectus

35. I refer also to the conflicting provisions of prospectus; in this regard paragraphs 19.10 and 4.3. First, paragraph 19.10 states that funds collected from investors would remain in the trust account in terms of section 78 2 (A) of the Attorneys Act. Investors' returns will be paid from the interest generated by the trust account. Paragraph 4.3 however, conveys that the funds would not stay long enough in the trust account with 10% being released after the cooling off period of seven days to pay commissions. The same statement is made in the application forms that clients had to complete in applying for the investment. This payment too was in violation of the Notice.

36. There are two problems with the proposition that the investor's return was paid from the interest generated by the trust account. They are:

    36.1 At the time, the interest payable by the bank on investments made in line with section 78 (2A) did not go beyond one digit. In fact, this office obtained information that the interest payable at the time was between 5.9% - 7%[12].

    36.2 The prospectus is unequivocal that the funds would not stay long enough in the trust account to have accumulated any significant interest as they were withdrawn, firstly seven days to fund commissions and subsequently, to fund the acquisition of the immovable property.

[12] http://www.fidfund.co.za/banking-options/credit-interest-rate-history/

36.3 The prospectus states that the interest payable on the claim component of the unit will be determined from time to time by the directors[13].

Sale of Business Agreement (SBA)

37. The prospectus issued by The Villa refers to a Sale of Business Agreement (SBA) concluded between The Villa (Pty) Ltd and the developer, Capicol 1 (summary attached, annexure A4). Two types of payments are dealt with in the SBA. They are: payments to the developer, Capicol 1 (Capicol) and an agent, Brandberg Konsultante (Pty) Ltd. (Brandberg).

Payments to Capicol

38. According to the agreement, investors' funds were moved from The Villa Ltd to The Villa (Pty) Ltd and advanced to the developer of the shopping mall. The payments were made well before transfer of the immovable property, and thus, were in violation of the provisions of Notice 459. At the time of releasing the prospectus of The Villa, Sharemax had already advanced substantial amounts to the developer in line with this agreement. (See paragraph 4.23 of The Villa prospectus). A brief analysis of the business agreement reveals:

38.1 No security existed for the loan in order to protect investors, which is clear from reading the prospectus and the agreement.

38.2 The prospectus states that the asset was acquired as a going concern, but the building was still in its early stages of development.

38.3 At the time the funds were advanced to the developer, the immovable property was still registered in the name of the developer. Although the prospectus mentioned the intention to register a mortgage loan, there is no evidence that it was registered.

[13] See paragraph 9.3.1

38.4 The developer paid interest of 14%, from which Sharemax took 2% and paid the remaining 12% to the investors of the Villa.

38.5 The agreement is devoid of detail relating to the assessment of the developer's credit worthiness.

38.6 No detail is provided to demonstrate that the directors of the Villa had any concerns about the Notice 459 violations.

38.7 There are no details regarding the economic activity that generated the 14% return paid by the developer.

The conclusion is ineluctable that the interest paid to investors was from their own capital.

39. There was also no evidence that the developer had independent funds from which it was paying interest; besides which, if the developer had the financial standing to borrow such large sums of money at 14% per annum, it would have gone to mainstream commercial sources.

Payments to Brandberg

40. An entity known as Brandberg was paid commission in advance. The commission is said to have been calculated at 3% of the purchase price of R2 900 000 000 according to the SBA. There are no details of the benefit to investors for paying the amounts to this entity. No valid business case is made as to why commission had to be advanced in light of the risk to investors. There was also no security provided against this advance to protect the interests of the investors.

41. It is plain from the response of the respondents that this risk was not disclosed. In the respondent's own version, they saw the shopping malls as security for complainant's capital. They could not have appropriately advised complainants in that case.

Respondent acted as representatives of USSA

42. The reply provided by respondent, which included an application form for USSA, intimated that respondent was acting in his capacity as an authorised representative of USSA in rendering financial services to complainant. The inclusion of this form does not assist respondent in any manner. See in this regard the decision of the Appeals Board in the matter of Black *v Moore*[14].

"In effect a "representative" executes the very same acts as are expected from the provider when operating alone with the exception of when a representative either:

1. *acts on behalf of the provider;*
2. *Subject to the provider concerned taking responsibility for these acts.*

Apart from these two (2) qualifications, a representative acts as if it were a provider.
...The provider is directly regulated by the FAIS Act and by the Registrar. But representatives are, apart from being regulated by the FAIS Act, in effect regulated by the overseeing provider rather than by the Registrar. Such provider clearly has a discretion on how precisely to exercise responsibility over a representative but should ensure in the agreements with the representative that the responsibility covers all aspects, including those duties and obligations imposed by the FAIS Act and the Regulations pertaining to them. The fact that the representative "acts on behalf of" the provider also means that in law, the provider may be held accountable for the acts and omissions of his representative and thus should be regarded as a co-respondent in the event of negligence on the part of the representative."

The complaint is thus directed at the correct person, the respondents. Besides, the respondents are fully aware that USSA was finally liquidated in 2012.

F. FINDINGS

43. On the basis of the reasoning set out in this recommendation, the risks in the investment were not disclosed, thus violating Section 7 (1). The section calls upon providers other than direct marketers

[14] In the Appeal Board of the Financial Services Board, John Alexander Moore and Johnsure Investments CC / Gerald Edward Black, 15 January 2013 at para 59 and 61

to provide "*a reasonable and appropriate general explanation* of *the nature and material terms of the relevant contract* or transaction to a client, *and generally make full and frank disclosure* of any information *that would reasonably be expected to enable the client to make an informed decision*".

44. Respondent further violated the Code in terms of section 8 (1) (a) to (c) and section 2. Respondent has provided no documentation to demonstrate that, despite having had access to all the relevant and available information pertaining to complainant, the recommendations made were appropriate to complainant's needs and circumstances.

45. As a consequence of the breach of the Code, the respondent committed a breach of his agreement with complainant in that he failed to provide suitable advice. The respondent must have known that complainant would rely on his advice as a professional financial services provider in effecting the investment in Sharemax.

46. The representations made to complainant were incorrect and in violation of section 3 (1) (a) (vii) of the Code. There is no doubt that had the complainant been made aware of the risks involved in these investments, he would not have invested in any of the schemes.

G. CAUSATION

47. The question that must be answered is whether respondent's flawed advice caused complainant's loss. Had respondent complied with the Code and sought investments that were in line with complainant's circumstances, there would have been no investments in any of the schemes. Respondent must have known that his clients were going to rely on his recommendations in making the investment. It stands to reason that the respondents caused the complainant's loss, which loss must be seen as the type that naturally flows[15] from the respondents' breach of contract.

[15] *Administrator, Natal v Edouard* 1990 (3)SA 581 (A); *Thoroughbred Breeders' Association of SA v Price Waterhouse* [2001] 4 All SA 161 (A), 2001 (4) SA 551 (SCA), paragraphs 46-49; Compare in this regard, *First National Bank v Duvenhage* [2006] SCA 47 (RSA).

H. RECOMMENDATION

48. The FAIS Ombud recommends that respondent pay complainant's loss in the amount of R500 000 in respect of The Villa and R500 000 in respect of HS 21.

49. The respondents are invited to revert to this Office within TEN (10) working days with their response to this recommendation. Failure to respond with cogent reasons will result in the recommendation becoming a final determination in terms of Section 28 (1) of the FAIS Act[16].

50. Interest at the rate of 10.25 % shall be calculated from a date TEN (10) days from date of this recommendation.

Yours sincerely

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Marc Julio Alves
Team Resolution Manager

[16] "*The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include-*
(a) the dismissal of the complaint; or
(b) the upholding of the complaint, wholly or partially…."