OUR REFERENCE: FAIS 05511/11-12/ GP 1

16 November 2017

MR C BARKHUIZEN

KOCH & KRUGER BROKERS CC

Per email: deon@kochkruger.co.za

DORATHEA SOPHIA VAN ROOYEN v KOCH & KRUGER BROKERS CC (first respondent), **DEON KRUGER** (second respondent) **AND CAREL BARKHUIZEN** (third respondent)

RECOMMENDATION IN TERMS OF SECTION 27 (5) (c) OF THE FAIS ACT 37 OF 2002

A. INTRODUCTION

1. During November 2009, complainant, now 67, (59 at the time) invested an amount of R1 462 000 in a public property syndication scheme called The Villa Retail Park[1] (The Villa), promoted by Sharemax Investment (Pty) Ltd (Sharemax). The investment stems from respondent's advice that Sharemax was a good, sound and secure investment that would render better returns than complainant's then existing investments.

2. Following the death of her husband who was the sole breadwinner in 2008, complainant had to rely on the money she inherited to sustain herself.

3. The income from the investment ceased in August 2010 and complainant's capital has not been repaid even though the investment period expired during November 2014.

B. THE PARTIES

4. Complainant is Mrs Dorathea S van Rooyen, an adult female pensioner whose particulars are on file with the Office.

[1] The Villa Retail Park Holdings Ltd, registration number 2008/017207/06, prospectus 15

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5. First respondent is Koch & Kruger Brokers CC, a close corporation with registration number 1992/007171/23, duly incorporated in terms of South African Law. The regulator's records confirm the first respondent's primary place of business as Suite 305, Medforum Building, Secunda, 2302. First respondent is an authorised financial services provider with license number 11085. The license has been active since 20 October 2004.

6. Second respondent is Deon Kruger, an adult male and key individual of first respondent. Second respondent's address is the same as that of first respondent.

7. Third respondent is Carel Barkhuizen, an adult male and key individual of first respondent. Third respondent's address is the same as that of first respondent.

8. At all materials times, second and third respondents rendered financial services to complainant. For convenience, I refer to first, second and third respondents as respondent. Where appropriate, I specify which respondent is referred to.

C. DELAYS IN FINALISING COMPLAINTS INVOLVING PROPERTY SYNDICATION INVESTMENTS

9. In view of our mandate to resolve complaints expeditiously, it is important to address the delay in finalising this complaint. Sometime in September 2011, after the Office issued the *Barnes* determination[2], the respondent in that matter brought an urgent application to set aside the determination[3]. 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.

10. Since no legal basis existed for respondent's demands, the Office continued to determine further property related complaints, to which respondents responded with an urgent application for an interdict to stop the Office from filing the determinations in court and issuing further determinations

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

[3] Respondent claimed that section 27 of the FAIS Act was unconstitutional

against them. The decision in the original application, favouring the Office, was finally delivered in July 2012. See in this regard *Deeb Risk v FAIS Ombud & Others*[4].

11. The Office continued to determine complaints involving property syndications after the High Court decision. However, in 2013 following the *Siegrist* and *Bekker* determinations[5] 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[6], after which the Office resumed processing complaints involving property syndications, with due regard to the decision. As many as 2000 complaints had to be shelved pending the Appeal Board's decision. The decision was not taken lightly but was a necessary risk management step.

D. THE COMPLAINT

12. Complainant and her husband met third respondent during 2002. At that time, complainant's husband was dealing with a serious health challenge. Mr van Rooyen asked third respondent to assist him with his will.

13. Complainant claimed that after Mr van Rooyen's passing in 2008, the third respondent insisted that the investments be made as soon as possible from her inheritance. He advised her to invest an amount of R1 509 300 in a Sanlam product called Topaz. At this time, the risk analysis conducted confirmed complainant to be a conservative investor. The investment having been effected, complainant received a monthly income from the Topaz investment of R15 000.

14. During the same time, (2008) a second investment in the amount of R1 609 300 was made in a Sanlam Glacier. Complainant was advised that this investment would be sufficient to cater for her needs as she becomes older.

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4 Gauteng High Court Division, case number 50027/2014

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

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

15. About 18 months after the aforesaid investments were made, third respondent, together with his partner (second respondent[7]) arranged a meeting with complainant to discuss an investment in Sharemax. Both second and third respondent assured her that the Sharemax investment was safe.

16. Complainant, pursuant to the advice, cashed in the Topaz investment and invested an amount of R1 462 000 in Sharemax The Villa Ltd.

17. Complainant became anxious when her income stopped in July 2010, specifically because of the negative media coverage that Sharemax was receiving. Respondent nonetheless assured her that the investment was sound and that her monthly income would continue. This however, did not happen, leading to complainant filing the present complaint on 23 November 2011.

18. Complainant is of the view that a reasonably experienced advisor would never have advised her to invest her money in a risky scheme such as Sharemax. She holds respondent liable for the loss she suffered, which amounts to approximately 50% of her retirement capital. Despite attempts to resolve the matter with respondent, complainant was unsuccessful[8].

19. Complainant has agreed to forego the amount in excess of R800 000 to bring the complaint within the jurisdiction of the Office.

E. RESPONDENT'S VERSION

20. Respondent duly replied on 12 January 2012 to the rule 6 (b) letter issued on 1 December 2011. The response is summarised below:

    20.1 Against the Topaz product which was not performing well at the time as a result of the withdrawals being made by the complainant, the respondent argued that the Sharemax investment compared favourably with an income of R15 000 monthly (which translates to interest rate of 12.5% per annum on the invested capital).

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[7] Second respondent was the only person of the said brokerage that was licensed as a representative of Unlisted Securities South Africa (USSA). He signed the application forms completed by complainant.
USSA was established by Gerhardus Rossouw Goosen while he was a director of Sharemax. Independent brokers like the respondent - who were licensed in their own right as Financial Services Providers, but lacked the correct license type - were able to market unsecured debentures as representatives of FSP Network Ltd, trading at the time as USSA. FSP Network was finally liquidated in 2013

[8] There is correspondence in file the to this effect

20.2 Respondent claimed to have explained, comprehensively, the unlisted commercial property syndication product to complainant. He mentioned that due to the closing date of the prospectus, the investment was done in a rush.

20.3 Complainant was provided with a complete prospectus which she had in her possession for a couple of days, prior to making the investment. Further, the complainant signed the application forms as well as the USSA documentation which explained the risks.

20.4 Respondent concluded that not all advisors attempt to place investments in high risk products merely to collect a high commission. The cancellation of the Topaz investment also negatively penalised respondent in respect of earlier commission earned.

21. On 29 June 2015 the Office addressed correspondence to respondent in terms of Section 27 (4) of the FAIS Act, informing respondent that the complaint had not been resolved and that the Office had intention to investigate the matter. Respondent was invited to provide the Office with his case, including supporting documents, in order to begin investigation. Respondent replied on 13 July 2015. Some of the questions raised are summarised below:

"11.2 The prospectus of both the Villa Retail Park Holdings as well as Zambezi Retail Park Holdings 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.

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

In response to this question, respondent replied with reference to paragraph 4.8.2.1[9] of the prospectus that investor income was paid partially from the interest earned on the trust account of the attorneys, as well as from Capicol 1's agreed rate of 11% per annum until occupation of the property.

[9] *"Investment Option A: A projected rate of return of 12.5%...from date of investment until the occupation date (the anticipated occupation date is 1 March 2011). It is however projected that for the first year after the occupation date (i.e until 29 February 2012) a projected rate of return of 11%...will be paid: provided further that the annual return on investment is projected to escalate on average by 4%...per annum during the first 3 years after the occupation date; 9% during the next 3 years and 8% thereafter…"*

11.4 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. Additionally, the registrar of companies within the prospectus states "that the shares on offer are unlisted and should be considered as a risk capital investment."

11.5 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?

Respondent stated that shopping malls are considered good investments by other large entities. Respondent stated that he could not have foreseen that the intervention of the South African Reserve Bank (SARB) and the negative publicity could bring the syndications to a halt. He therefore did not consider the investments high risk. The controls that were in place by the FSB and other relevant entities assured respondent that investors would be protected. Lastly, as a representative of USSA, he was under the impression that the relevant research had been done by them.

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

Respondent alluded to the clause in the USSA document which stated that the repayment of income and capital is not guaranteed, unless explicitly stated so in the prospectus. The performance of the syndication is not guaranteed and the investment is unlisted, thus making it a risk capital investment. (own emphasis)

11.7 What information did you rely on to conclude that this investment is 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".

Respondent stated that complainant's investment portfolio at the time was overweight in cash. The amount of income complainant required would have eroded her capital, and it was only growing at 6.2% at the time. It was therefore obvious that medium to aggressive investments had to be considered to provide for the capital growth required. Complainant had little exposure to property, thus Sharemax was offered as an option.

F. INVESTIGATION

22. On 5 July 2017, respondent was provided with another opportunity to address the Office in terms of section 27 (4) of the FAIS Act. Specific questions were raised, in respect of which this Office requested answers from respondent. The questions (omitting words not essential) are set out below:

"In addition to the questions already asked, we require your response to the following:

3.1 The prospectus of Villa Retail Park states that Sharemax was the promoter, the company secretary, property manager and manager of investor funds. Given the overlapping roles and the obvious conflict of interest, what steps did you take to ensure that your client will be protected against director misconduct?

3.2 Are you able to provide evidence that you had ascertained the cost levied by aforementioned entities for the services mentioned in paragraph 3.1?

3.3 The prospectuses further inform potential investors that there is essentially no independent board of directors. There is a clause stipulating that a new board will be elected on date of the first meeting of shareholders, however, there is no proof that this occurred. There is an additional statement made regarding the current directors having to remain in addition to whoever will be elected. Given that there was no independent board of directors (as provided for in King III) what steps did you take to satisfy yourself that your clients will be protected against director misconduct?

3.4 Given the absence of an independent board, what steps did you take to ensure that there are sufficient safeguards and controls internally to ensure that investor funds were utilised for what they were meant for, and in line with proper governance prescripts?

3.5 You should be aware that the oversight of a board includes the appointment of an audit committee, whose function, amongst others, is to receive assurance from an independent audit firm. An audit committee's oversight also includes satisfying itself that there are proper controls within the entity, and that the information contained in the financial statements of the entity can be relied on. Given there was no audit committee and no audited financial

statements, what information did you take into account to conclude that this was a viable investment?

3.6 We would like you to set out the steps you took to understand the risk involved in this product.

3.7 Did you ever confirm the valuation figures shown in the prospectus with the property valuer cited in the prospectus?

3.8 What was the response of the property valuer in relation to the figures quoted in the prospectus for the buildings?

3.9 You should be aware that Government Notice 459 of Gazette 28690 mandates that investor funds must be kept in a registered or protected trust account until registration of transfer into the syndication vehicle, or underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding. Given that the prospectus makes it clear that investors' monies will be advanced to a developer, what made you recommend the product to your client in the face of this high risk?

3.10 What steps did you take after noting that the promoter has an interest in the syndication? We require proof of the actions taken to ensure that your client was provided with this material in order to make an informed decision?"

23. In reply to the aforesaid note, respondent stated that all of the questions raised should be answered by USSA. The latter was responsible for ensuring compliance of the prospectus with the relevant legislation.

G. ANALYSIS

24. Respondents does not deny that they had an agreement with complainant in terms of which they rendered financial services to her. The advice, undoubtedly, had to meet the standard prescribed in the General Code of Conduct, (the Code). On respondent's own version, he recommended Sharemax to complainant in an attempt to diversify complainant's portfolio which was, in his view, overweight

in money. This advice was subsequently acted on by complainant. There are no disputes in that regard.

The law

The following sections of the General Code of Conduct are relative to the issue of advice:

25. Section 2, part II of 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.

26. Section 3 (1) (a) of the Code provides that when a provider renders a financial service, that:

"(a) representations made and information provided to a client by the provider -

(i) must be factually correct;

(ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading;

(iii) must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client;

(iv) must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction".

27. Section 8 (1) (a) to (d) 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; and

(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…."

28. Section 9 provides for maintenance of a record of advice which must reflect a brief summary of the information on which the advice was based, along with the financial products considered and the financial products that were recommended with a brief explanation as to the reasons the recommended product was deemed suitable to address the complainant's identified needs.

Representatives of USSA

29. Throughout their responses to this Office, respondent relied on the fact that they acted in their capacity as representatives of USSA, thus implying that they cannot be held accountable for the advice rendered.

30. To determine whether respondent may be held liable for the financial services rendered whilst acting in his capacity as representative of USSA, attention should be given to the definition of a representative[10]. The definition of a representative assumes that a person acting as a representative has to exercise the relevant final judgment, decision making and deliberate action inherent in the rendering of a financial service to a client[11].

31. In *Moore versus Black*[12], the Appeal Board stated as follows:
"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.

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10 According to Section 1 of the FAIS Act 37 of 2002, a 'representative 'means any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial service provider, in terms of conditions of employment or any mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in subsidiary or subordinate capacity…

11 Nell v Jordaan FAIS 05505-12/13 GP 1

12 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

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".

32. The question of whether a representative [and not the provider] should be held liable in this context was again dealt with by the Board of Appeal in the second *Black v Moore* Appeal[13]. Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lay not with the appellant as a representative, but rested solely with the financial services provider. In dismissing the argument, the Board concluded, *'the effect of the Exemption Notice thus allows a representative (due to his minimum experience) to market products subject to a supervisor's guidance. Apart from this exemption, he has to comply with the Code of Conduct.'*

33. Section 13 (2) (b) of the Act[14] states:

"An authorised financial services provider must take such steps as may be reasonable in the circumstances to ***ensure that representatives comply with any applicable code of conduct*** *as well as with other applicable laws on conduct of business*." (My emphasis).

It is clear that there is a duty imposed not only on the provider but also the representative to comply with the provisions of the FAIS Act and Code of Conduct.

The complaint is thus directed against the correct parties, the respondents. I add in this regard that USSA was finally wound up during 2012.

The prospectus

[13] Decision handed down on 14 November 2014, paragraphs 18 to 23

[14] Financial Advisory and Intermediary Services Act 37 of 2002

34. The questions posed in the notices in terms of section 27 (4) sent by this Office to respondent had their answers recorded in the prospectus. Had respondent paid attention to the prospectus, he would have understood that the investment was not suitable for his client whom from respondent's own account was a conservative to moderately conservative investor.
I refer in this regard to the attached annexures, being summaries of the prospectus The Villa Ltd, the Sale of Business Agreement, (SBA) and Government Notice 459, (Notice 459) as published in Government Gazette 28690.

Violations of Notice 459

35. From the onset, paragraphs 3.2 and 3.1.1 of the prospectus make it clear that the directors of Sharemax, who also were directors of all the other Sharemax companies involved in the prospectus had no intention to comply with Notice 459.

36. Section 4.3 makes provision for the disbursement of investors' funds to pay for the entire shareholding in The Villa Retail Shopping Investments (Pty) Ltd (The Villa (Pty) Ltd) from Sharemax. There is no detail as to how this benefited investors. In section (4.3) the prospectus discloses that investor funds will be paid out to the seller of the immovable property via a sister company, namely, The Villa (Pty) Ltd and later to Capicol 1, well before the transfer of the immovable property into the name of the syndication vehicle.

37. The movement of the funds was illegal and a direct affront to Notice 459, which is meant for the protection of investors. I conclude that respondent must have been oblivious to the risk and could not have appropriately advised complainant in that case.

38. The prospectus does not hide the universal role of the promoter, highlighting that investors would have no protection whatsoever as the directors were conflicted and would only be accountable to themselves. The investors were therefore at the mercy of the directors.

Conflicting provisions of the prospectus

39. I refer also to the conflicting provisions of the prospectus with regards to the management of investor funds. Paragraph 19.10 states that all moneys received in terms of the offer would be administered in trust by the attorneys and received by the bank in a separate interest-bearing account opened and

controlled by the attorneys for each and every applicant, in terms of section 78 (2A) of the Attorneys Act, until (in respect of successful applicants) the minimum subscription is received and the immovable property has been transferred to the syndication vehicle.

40. In contrast however, the same prospectus provided that upon payment of the purchase price into the attorney's trust account, an amount equal to 10% of the investor's capital would be released to Sharemax to pay commissions. These payments were also in violation of the Notice. Respondent however noted in the record of advice that the 6% commission payable to him, would be paid by Capicol. It is not clear what led respondent to believe that the developer would be paying his commission.

41. Two problems further arise with the proposition that the investor's return was paid from the interest generated by the trust account:

41.1 At the time, 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 3.5% - 5%[15]. Sharemax promised 12.5% which was way out of bounce with industry standards.

41.2 The prospectus is unequivocal that the funds would not stay in the trust account long enough to have accumulated any significant interest since it was withdrawn, firstly after seven days to fund commissions and subsequently, to fund the acquisition of the immovable property.

41.3 Respondent nonetheless concluded that there would be sufficient interest accrued in the trust account to pay the said interest. This is another indication that respondent was out of his depth when this investment was recommended.

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

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15 http://www.fidfund.co.za/wp-content/uploads/2016/03/Historical-Credit-Interest-Rates-from-30-01-2014.pdf

Payments to Capicol 1

43. 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. At the time of releasing the prospectus of The Villa, Sharemax had already advanced substantial amounts to the developer in line with this agreement[16]. A brief analysis of the business agreement reveals:

43.1 No security existed for the loan and this is clear from reading the prospectus and the agreement.

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

43.3 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 this was done.

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

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

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

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

43.8 The only rational conclusion is that the interest paid to investors came from their own capital.

[16] Paragraph 4.23 of The Villa prospectus

44. There was no evidence that the developer had independent funds from which it was paying interest. Besides, 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

45. An entity known as Brandberg was paid commission in advance. The commission is said to have been calculated at 3% of the purchase price, according to the SBA. There are no details of how these payments benefited investors. No valid business case is made as to why commission had to be advanced, in light of the risk to investors.

46. There was also no security provided against this advance to protect the investors' interests.

47. These are serious red flags (as comprehensively noted in the annexures) that were apparent from the start and should have led a reasonable person, particularly one in the position of respondent, to foresee the harm and take steps to mitigate it accordingly[17].

48. On the basis of information set out in this recommendation, respondent failed to provide suitable advice to complainant, as provided for in the Code in section 8 (1).

49. Likewise, there is no evidence that respondent disclosed the risks in the investment, thus violating Section 7 (1). The section 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*". It was not sufficient to hand a prospectus to complainant. Besides, respondent has provided no information to this Office to support that complainant could easily comprehend the contents of the prospectus. The prospectus is a complicated, voluminous document.

H. CAUSATION

[17] *Van Wyk v Lewis, Durr v ABSA*, case number 424/96, SCA

50. Respondent was well aware of complainant's financial status and her circumstances and that she had no reasonable prospect of recovering any losses she might suffer should an investment fail. Despite this respondent still considered an investment in Sharemax appropriate. There was no diversification for the purposes of minimizing risk, and no justification or explanation in terms of section 8 (1) (a) to (c) as to why the Sharemax investment prevailed.

51. There is absolutely no evidence that respondent had appreciation of the risk involved in these investments, which leaves me to conclude that respondent failed to advise complainant appropriately. I concluded that it was respondent's inappropriate advice that caused complainant's loss. Had respondent adhered to the Code, no investment would have been made in Sharemax.

I. FINDINGS

52. Respondent violated the Code in terms of section 8 (1) (a) to (d), section 9, section 2, section 3 (1) (a) and section 7 (1).

53. 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. There is no doubt that had the complainant been made aware of the risks involved in this investment, she would not have proceeded.

54. It stands to reason that the respondent caused the complainant's loss, which loss must be seen as the type that naturally flows from the respondents' breach of contract[18].

J. RECOMMENDATION

55. The FAIS Ombud recommends that respondent pay the amount of R800 000 to complainant.

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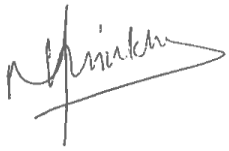
[18] *Administrator, Natal v Edouard* 1990 (3)SA 581 (A); *Thoroughbred Breeders' Association of SA v Price Waterhouse* [2001] 4 All SA 161 (A), 2001 (4) SA 551 (SCA), paragraphs 46-49; Compare in this regard, *First National Bank v Duvenhage* [2006] SCA 47 (RSA).

56. 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[19].

Yours sincerely



ADV M WINKLER

ASSISTANT OMBUD

[19] "*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…."