FAISOmbud
Office of the Ombud for Financial Services Providers

**OUR REFERENCE:** **FAIS 03406/12-13/ EC 1**
**FAIS 03408/12-13/ EC 1**
**FAIS 03409/12-13/ EC 1**
**FAIS 03410/12-13/ EC 1**
**FAIS 03411/12-13/ EC 1**

**17 August 2017**

**ATTENTION: Mr Stephanus Johannes Du Preez**
**The Meadow Group**

**Per email: fanie@themeadowgroup.co.za**

Dear Mr Du Preez

**Mr Bernardus Rudolf Vorster (first complainant) and Mrs Magdalena Josina Vorster (second complainant) v Fanie Du Preez Makelaars CC t/a The Meadow Group (first respondent) and Mr Stephanus (Fanie) Johannes Du Preez (second respondent).**

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

## A. INTRODUCTION

1. On 2 August 2012, Mr and Mrs Vorster (the "complainants") filed a complaint with this Office against The Meadow Group and the key individual and authorised representative, Mr Stephanus Johannes Du Preez (collectively referred to in this recommendation as the "respondent"). The complaint arose from failed investments made by complainants, on respondent's advice, into various public property syndication schemes, namely, Theresapark Retirement Village Development Fund Limited[1] ("Theresapark Ltd"), and The Villa Retail Park Holdings Limited [2]('The Villa Ltd"), both promoted by

[1] Registration number 2008/0004492/06

[2] Registration number 2008/017207/06



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

Sharemax Investment (Pty) Ltd ("Sharemax") and Highveld Syndication 15 (HS 15) promoted by PIC Syndications (Pty) Limited[3] ("PIC" or Picvest).

**Delays in finalising this complaint**

2. I find it important to address the delay in finalising this complaint. Sometime in September 2011, after the Office issued the *Barnes* determination[4], the respondent in that matter brought an urgent application to set aside the determination[5]. Before the fate of the application could be known, respondents sought an undertaking from this Office that it would not proceed with any other property syndication related complaints involving them.

3. Since no legal basis existed for respondent's demands, the Office proceeded 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 against them. The decision, favouring the Ombud, was finally delivered in July 2012. See in this regard *Deeb Risk v FAIS Ombud & Others*[6].

4. The Office continued to determine complaints involving property syndications after the High Court decision. However, in 2013, following the *Siegrist* and *Bekker* determinations[7] 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[8], 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 during this period, pending the Appeals Board decision.

---

3 Registration number 2002/000736/07

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

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

6 Gauteng High Court Division, case number 50027/2014

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

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

**B. THE PARTIES**

5. First complainant is Mr Bernardus Rudolf Vorster, an adult male pensioner whose full particulars are on file with this Office. Second complainant is Mrs Magdalena Josina Vorster an adult female pensioner whose full particulars are on file with this Office. First and second complainant are married to one another. I use complainant/s in this recommendation interchangeably.

6. First respondent is Fanie Du Preez Makelaars CC t/a The Meadow Group, a close corporation duly incorporated in terms of South African law, with registration number (1995/039060/23). The first respondent is an authorised financial services provider (FSP) (licence number 15422) with its principal place of business noted in the Regulator's records as 73 6th Avenue, Newton Park, Port Elizabeth, 6001. The licence has been active since 26 November 2004.

7. Second respondent is Stephanus (Fanie) Johannes Du Preez, 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 first respondent was not licensed to render financial services in connection with unlisted shares and debentures, which are categorised as 1.8 and 1.10 respectively in the FAIS Act, when the initial investment into PIC was recommended to complainant during May 2005. It was only on 29 July 2005 that respondent acquired licence category 1.8 (described in the FAIS Act as Securities and Instruments: Shares). Subsequent investments made into the Sharemax syndications on 28 October 2008, 17 March 2009 and 20 March 2009 were however recommended without respondent having been registered for debentures in terms of category 1.10 (described in the FAIS Ac as Securities and Instruments: Debentures and Securitised Debt). This additional category was added to respondent's licence on 9 September 2009.

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

## C. THE COMPLAINT

10. In 1997, complainants retired from teaching and were receiving income of R2 400 each on a monthly basis from their retirement savings. In addition, first complainant received an amount of R2600 income from a rented property. Complainants were looking for means to supplement their retirement income when they sought help from respondent. They claim that from their initial engagements with respondent they stressed that they had no capacity to absorb any losses and would need an investment which provided a regular income to supplement their existing limited income, and that their capital had to be guaranteed.

11. Following recommendations by respondents, complainants made a total of six investments, four in the name of first complainant and two in the name of second complainant, into various property syndication schemes, at various intervals. The investments were made as follows:

**First complainant**

May 2005 – R30 000: PIC Highveld Syndication (HS)
October 2008 – R20 000: Sharemax Theresa Park Retirement Village Ltd
March 2009 – R60 000: Sharemax The Villa Ltd

**Second Complainant**

20 March 2009 - R20 000: Sharemax The Villa Ltd
15 April 2010 - R30 000: The Villa

12. The sixth investment was in a Sharemax property syndication known as Canterbury Crossing Ltd. This investment is not part of the complaint as complainants have confirmed that they were paid out in full.

13. It is complainants' version that respondent had provided them with copious amounts of paperwork, which included prospectuses. However, at no time was the content of the documents or the prospectuses explained to them, especially the risks associated with the investments.

14. It has been confirmed that all income has ceased and that complainants no longer receive any income from these investments. Complainants hold respondent liable for the repayment of their capital.

## D. RESPONDENT'S VERSION

15. Respondent's reply was received on 21 September 2012 following our rule 6 (b) letter of 10 August 2012. The response is summarised below:

15.1 Respondent confirmed that he had a long relationship with complainant and that he had assisted him with financial advice on *ad hoc* investments.

15.2 Respondent confirms that complainants had lost a substantial portion of their pension in a cash loan business they were running. They had expressed their requirement for the highest possible return over a long term to compensate for the losses sustained in the cash business.

15.3 No needs analysis was carried out as complainants had a single need: a higher monthly income with capital growth.

15.4 The investments were made after complainants had been fully informed of the nature and extent of the investment, as well as the risks involved together with potential liquidity restrictions. Complainants also signed all documentation in confirmation of the disclosures made and the acceptance thereof. It will be recalled that complainant's version is that respondent had not explained the contents of the prospectuses and the documents presented to them for signature. None of the records provided by the respondent spells out the risks.

15.5 Respondent claimed that all investments were *ad hoc* and were made at the special request of complainants.

15.6 Finally, respondent stated that complainants had sufficient cash reserves which included their pension and income from businesses[9].

[9] Respondent provided no documentation in support of these claims, which also contradict respondent's confirmation of Complainants losses sustained in a failed business venture.

## E. INVESTIGATION

16. During June 2015, this Office sent notices[10] 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 intentions to investigate the matter. The letters read (omitting, for now, words not material to the essence):

*16.1 '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.*

*16.2 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.*

*16.3 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. An ex post facto account of what was said, will not be acceptable.*

*16.4 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.'*

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

18. Respondent provided a response to the Section 27(4) Notice on 7 August 2015. The response is summarised below:

[10] Note that the complaints have since been consolidated to one complaint.

18.1 Without being specific, respondent pointed out that there were material disputes of fact between his version and that of the complainant and that the matter should be referred to civil court.

18.2 The prospectuses of each investment were provided and explained to complainants, and they had signed the application forms and the certificate titled "Risk Assessment and Product Information".

18.3 Referring to paragraph 4 of the Sharemax prospectuses, respondent made the point that Sharemax promoted each new investment opportunity by way of a new company and that the track record of Sharemax as a promoter illustrated to the potential investor the viability of the investment model.

18.4 The respondent was satisfied that a potential investor would know how the investment was structured and what to expect of the proposed investment companies set out in the prospectus.

18.5 Extracts from the Sharemax prospectuses as well as from the PIC - Highveld prospectus were annexed to the response confirming the registration of the prospectuses by the then Companies and Intellectual Property Registration Office ("CIPRO"), as further proof that complainants understood the structure of the various syndications.

## F. ANALYSIS

19. It cannot be disputed that the parties had an agreement that respondent would render financial services to complainant. The specific form of financial service this complaint is concerned with is advice. The advice, without doubt, had to meet the standard prescribed in the FAIS Act and the General Code.

**Disputes of fact**

20. I note the claim by respondent that the complaint must be referred to court owing to the disputes of fact between complainant's and respondent's versions. It must be borne in mind however, that the

Code in section 3 (2) demands that providers maintain a record of all verbal exchanges with the client in relation to the financial service rendered. In addition, the Code in section 9 further enjoins providers to maintain a record of advice which shall set out the products considered and the product/s recommended to the client, including reasons the recommended product is likely to meet the client's circumstances.

21. The records called for by the Code are not only for the benefit of clients but for the providers rendering financial services. In circumstances such as these, the records would assist the provider.

22. Having said, this matter can be dealt with on the basis of facts that are common cause between the parties. There is no dispute regarding the complainants' retirement status at the time of advice. On his own version, respondent has known the complainants for many years and was even aware of the losses they suffered as a result of their failed cash loan business. Respondent has also not disputed that complainants were both generating income of R2400 each per month from their retirement savings with the first complainant generating an additional income of R2600 per month from rental properties.

23. Without providing any supporting documents however, respondent contradicted himself in his response stating that complainants had sufficient cash reserves, which included their pension and income from businesses.

24. The following sections of the Code are germane to this case:

    24.1 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.

    24.2 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…"*

25. 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".*

26. The facts that have not been denied by respondent indicate that his clients had instructed him that they could not afford to sustain any losses and that they were looking for an investment that would safeguard their capital. In his recommendations to the complainants, respondent recommended the investments in PIC and Sharemax.

27. I highlight, in the paragraphs that follow, that respondent's advice was fundamentally flawed because nothing in all the schemes guaranteed investor capital. If anything, the prospectuses of all the schemes into which complainants' funds were invested, made it plain that the investments were far too risky and guaranteed neither the capital nor the income. Respondent therefore had no basis to invest complainants' funds into the schemes; his recommendations were either a result of incompetence or lack of skill, (in which case respondent was negligent in recommending investments he could not comprehend), or recklessness, in the event respondent appreciated the magnitude of risk involved in the investments and still went ahead with his recommendations, 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.

**HS 15 – PIC** (summary attached hereto)

**Conflict of interest and other matters of governance**

28. It should be noted that there was no evidence at the time that there was ever an independent board of directors in the entire group of PIC, nor were there audit, risk and remuneration committees. From the onset, the prospectus made it clear that the one or two role players had far reaching powers. In this regard, the investor funds were managed by the same people who were property managers, transfer secretaries and company secretaries. The conflict of interest alone meant that investors would have no protection and would be at the mercy of directors.

29. Tucked away **in Appendix 3** are several paragraphs dealing with the appointment of directors, remuneration, qualifications and borrowing powers of directors, including matters concerning voting, where directors are conflicted. To begin with, even though the statement is cast in a confusing way, the prospectus makes it clear that directors need no qualifications whatsoever to stand as directors. When one considers this particular provision alone and the size of money involved in the operation including the fact that these were investor funds, this should have sounded warning bells to respondent. Directors were entitled to compensation for all expenditure incurred in the pursuance of the company's business. Given that there was no independent board, this simply means there was no mechanism to restrain directors from helping themselves from the investor funds. In addition, the prospectus makes it plain that even in matters where directors are conflicted, they were allowed to vote provided they had declared the conflict.

30. I add that the prospectus carries pointed statements that the investment is in unlisted shares and therefore carries risk to investors' capital. Notwithstanding these far reaching provisions, respondent saw the offering as a suitable investment to meet his clients' needs for income and security of their capital, given their circumstances and their financial means. I note once again that on the undisputed facts, the complainants' income was known to respondent and that they needed these investments to supplement their income, which they deemed insufficient.

31. The Client Advice Record provided by respondent records that the investment was recommended because complainants required high income and capital growth over the long term, and that the

investment in PIC was desirable as it provided a higher rate of return than the more traditional insurance products. This document does not however detail any of the risks involved in this investment, despite respondent having specific knowledge of complainants' situation.

32. With regard to the claim made by respondent that he had explained the risks involved but recommended these investments because complainants required high income, (see records of advice), the law required him to advise his clients as to the consequences of investing in an investment that is not in line with their circumstances. The record that should have been prepared at the time by the respondent is provided for in section 8 (4) of the Code. That record does not appear anywhere in respondent's papers. In fact, his records of advice are silent as to the nature of his advice to his clients.

**Theresa Park Ltd** (summary attached)

**Conflict of interest**

33. The directors of all the companies involved in this syndication, namely, Theresapark Ltd (the company into which complainants' investment was paid), Amber Sunrise (the developer), and Sharemax Growth were essentially the same. The conflict of interest was palpable.

34. The prospectus further does not hide the pervasive role of the promoter. Sharemax was the promoter, the company secretary, transfer secretary, asset manager and property manager. Bearing in mind that there was no evidence that there was ever an independent board of directors, audit and risk, nor remuneration committees, the structure and arrangement of a multiplicity of companies, all of which appear to have been controlled by the same persons suggests that investors would have no protection whatsoever as the directors would only be accountable to themselves.

35. A basic knowledge of corporate governance would have alerted respondent to the inherent risks. Reference is drawn to the King II report where one of the seven characteristics of good corporate governance is independence. It is explained as: "*Independence is the extent to which mechanisms have been put in place to minimise or avoid potential conflicts of interest that may exist, such as dominance by a strong chief executive or large shareowner. These mechanisms range from the composition of the board, to appointments to committees of the board, and external parties such as*

*the auditors. The decisions made, and internal processes established, should be objective and not allow for undue influences".*

**Violation of Notice 459**

36. The prospectus makes it clear that investors' fund will be retained in the trust account until the share and claim certificates had been issued. This is contrary to the requirements of Notice 459 (refer to the summary dealing with Notice 459).

**The Villa Ltd**

**Violations of Notice 459**

37. 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, had intention to violate Notice 459.

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

39. The prospectus disclosed (in paragraph 4,3) that investor funds will be paid out to the seller of the immovable property, Capicol 1 via The Villa (Pty) Ltd, well before registration of transfer of the immovable property into the name of the syndication vehicle.

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

**Conflicting provisions of the prospectus**

41. I refer also to the conflicting provisions of the 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 because 10% would be 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.

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

42.1 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%[11].

42.2 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 after seven days to fund commissions and subsequently, to fund the acquisition of the immovable property.

42.3 The prospectus states that the interest payable on the claim component of the unit will be determined from time to time by the directors[12].

**Sale of Business Agreement (SBA)**

43. 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 and an agent, Brandberg Konsultante (Pty) Ltd. (Brandberg).

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

[12] See paragraph 9.3.1

**Payments to Capicol**

44. 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:

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

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

44.3 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.

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

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

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

44.7 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.

45. 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**

46. 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.

47. It is plain from the respondents' reply that this risk was not properly disclosed. On the respondent's own version, they saw the shopping malls as security for complainants' capital. They could not have appropriately advised complainants in that case.

## G. FINDINGS

48. On the basis of the reasoning set out in this recommendation, the risks in the investment were not disclosed, 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*".

49. Respondent further violated the Code in terms of section 8 (1) (a) to (c) and section 2.

50. Respondent failed to provide complainants with a recommendation that was appropriate to their needs and circumstances. Despite conflicting claims that complainants had sought higher income and capital growth, there is no indication that respondent had adhered to the provisions of section 8 (4) of the Code.

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

52. 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, they would not have invested in any of the schemes.

## H. CAUSATION

53. The question that must be answered is whether respondent's flawed advice caused complainants' 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 investments. It stands to reason that the respondent caused the complainant's loss, which loss must be seen as the type that naturally flows[13] from the respondent's breach of contract.

## I. RECOMMENDATION

54. The FAIS Ombud recommends that respondent pay complainant's loss in the amount of R160 000.

55. 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[14].

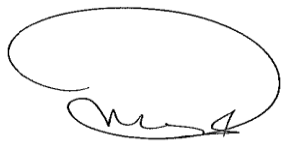
---

13 *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).

14 "*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….*"

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

Yours sincerely



_____

**NOLUNTU N BAM**
**OMBUD FOR FINANCIAL SERVICES PROVIDERS**