OUR REFERENCE: FAIS 05123/12-13/ FS 1
FAIS 00777-/12-13/ FS 1

7 November 2017

ATTENTION: Mr K Eagar
KOBUS EAGER - INDEPENDENT FINANCIAL BROKER

Per email: kobuseagar@telkomsa.net

Dear Mr Eager

YOLANDE HAMMAN (complainant) **v KOBUS EAGER** (respondent)
RECOMMENDATION IN TERMS OF SECTION 27 (5) (c) OF THE FAIS ACT (37 of 2002)

A. INTRODUCTION

1. The complainant, a client of the respondent since July 2001, invested in two Sharemax property syndication schemes, Zambezi Ltd and Berg en Dal Ltd, pursuant to advice furnished by the respondent. The investments were effected in July 2008 following assurances by the respondent that her investments would be safe.

2. After effecting the investments, the complainant received interest payments as agreed until August 2010 when the payments suddenly stopped. The complainant claimed that her efforts to resolve the matter with the respondent were in vain. She considers her capital lost and blames the respondent for the loss.

B. THE PARTIES

3. The complainant is Mrs Yolande Hamman, an adult female whose full particulars are on file with this Office.

4. The respondent is Kobus Eager, an adult male sole proprietor whose address according to the regulator is 18 Thompson Street, Bethlehem. The respondent is an authorised financial services

provider in terms of the FAIS Act with licence number 7145. The licence has been active since 3 September 2004.

5. At all material times the respondent rendered financial services to the complainant.

Delays in finalising this complaint

6. In view of our mandate to resolve complaints expeditiously amongst other demands posed by section 20 of the FAIS Act, it is imperative to address the delay in finalising this complaint. Sometime in September 2011, after the Office issued the *Barnes* determination[1], the respondent in that matter brought an urgent application to set aside the determination[2]. Before the fate of the application could be known, the respondents sought an undertaking from this Office that it would not proceed to determine any other property-syndication-related complaints involving them.

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

8. The Office continued to determine complaints involving property syndications after the High Court decision. However, in 2013 following the *Siegrist* and *Bekker* determinations[4] 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[5], after which the Office

---

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

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

3 Gauteng High Court Division, case number 50027/2014

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

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

resumed to process complaints involving property syndications with due regard to the decision. As many as 2000 complaints had to be shelved pending the Appeals Board decision.

C. THE COMPLAINT

9. During May 2008, the complainant contacted the respondent for financial advice. At the time, the complainant was 31 years of age and employed as a microbiologist. She was also recently divorced and responsible for her daughter. The complainant wanted to invest the money she had received as part of her divorce settlement. The aim of the investments, according to the complainant and also communicated to the respondent, was to provide for her child's education and grow the funds in order to utilise them as a deposit for immovable property.

10. The respondent met with the complainant more than once to make representations about Sharemax. The complainant claims she was not persuaded by the proposals made about Sharemax. She was also concerned that no quotations for alternative products were presented to her by the respondent. Of her own accord, she therefore explored investment options with other entities and decided to make an investment with Standard Bank. The complainant informed the respondent of her decision.

11. According to the complainant, the respondent persuaded her not to go ahead with the Standard Bank investment. Instead, the respondent arranged for a Sharemax representative, one Mr Hertzog, to visit the complainant at her workplace. Mr Hertzog met the complainant and, according to the complainant, he advised her that the Sharemax investments were safe and guaranteed. The statements made by Hertzog weighed heavily in favour of Sharemax. Following the interaction with Hertzog, the complainant agreed to invest in Sharemax.

12. In July 2008 and pursuant to the advice received from the respondent and later confirmed by Hertzog, the complainant invested an amount of R255 000 in Sharemax Zambezi Ltd. A further R50 000 was invested in Berg en Dal Ltd on the same day. In respect of the Zambezi investment, the complainant was advised that monthly income would be 12%[6] on the capital invested. The Berg en Dal investment was aimed at capital growth and was fixed for five years with no income payments. Both the

---

[6] As per the quotation presented to the complainant on 3 July 2008

quotation and prospectus indicated a projected return of 20% of the capital invested over the said period[7].

13. The complainant initially received her monthly interest until August 2010, when it suddenly stopped. The complainant states that she was unaware that Sharemax had been hit by financial problems. She later read a newspaper article that carried the story about Sharemax and its financial troubles. To date, the complainant's capital has not been repaid.

14. In her complaint, the complainant charges that the respondent had never mentioned to her that there were risks involved in her investments. In fact, she had been repeatedly informed by the respondent that the investments were safe. The complainant further claims that the respondent had advised her that the commission payable would not come from her capital.

D. THE RESPONDENT'S VERSION

15. In terms of Rule 6 (b), this Office referred the complaint to the respondent in October 2012 and advised the respondent to resolve the complaint with his client. The respondent's reply is summarised below:

    15.1 The respondent met the complainant in May 2008 to discuss her investment and insurance portfolio. The complainant was concerned with the performance of her investment, which was with a bank at the time. Owing to the fact that conventional products did not provide decent rates, the respondent introduced the options of Sharemax and (Picvest) PIC as alternatives.

    15.2 The respondent explained that at his own request Mr Hertzog met with the complainant to provide her with more information about Sharemax. Following the discussion between the two, the complainant decided to invest in the two Sharemax schemes.

    15.3 The respondent stated that he had explained the associated risks, the costs and the investment terms and further presented the complainant with the two prospectuses. The

7 The quotation anticipated that the project could be finalized after two years. Also refer to paragraph 6.2 of the prospectus where the returns are illustrated.

complainant thereafter signed the application forms and confirmed she had emergency funds.

15.4 According to the respondent, he had carried out an extensive due diligence study that covered enquiries into the suitability and properness of Sharemax, its directors, and the validity of the prospectuses. He further took into account the institutions involved: the attorneys, the Financial Services Board (FSB), and the property valuers[8].

15.5 In conclusion, the respondent is of the view that he provided the complainant with sufficient information for making an informed decision.

16. On 12 June 2015 this Office addressed correspondence to the respondent in terms of Section 27 (4) of the FAIS Act, which informed the respondent that the complaint had not been resolved and that the Office had the intention of investigating the matter. The respondent was invited to provide the Office with his case, including supporting documents, in order for the Office to begin its investigation. Apart from confirming that he had dealt with the complaint in 2012, the respondent made no further submissions.

E. ANALYSIS

17. It is evident from both parties' versions that they had an agreement in terms of which the respondent had to render advice to the complainant. In rendering advice to the complainant, the respondent had to meet the standard prescribed in the General Code of Conduct (the Code).

The Law

18. Section 2 in part II of the Code states that a provider must at all times render financial services honestly, fairly, with <u>due skill</u>, <u>care and diligence</u>, and in the interests of clients and the integrity of the financial services industry.

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

A provider other than a direct marketer, <u>must</u>, prior to providing a client with advice –

8 In this regard, the respondent noted in his response that the valuation certificate was issued by registered valuers, which raised the question as to why a reasonable person would question it.

(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…*

20. Section 8 (4) (b) further provides 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.*

21. Last, section 9 provides for the keeping of a record of advice which <u>must</u> reflect the following:

(a) *a brief summary of the information and material on which the advice was based;*

(b) *the financial product [sic] which were considered;*

(c) *the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives; and*

(d) *where the financial product or products recommended is a replacement product as contemplated in section 8(1)(d) –*

(aa) *the comparison of fees, charges, special terms and conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided, between the terminated product and the replacement product; and*

(bb) *the reasons why the replacement product was considered to be more suitable to the client's needs than retaining or modifying the terminated product…*

The prospectuses

22. I refer to the attached annexures, which provide summaries of the prospectuses of Zambezi Ltd and Berg en Dal Ltd, and the applicable legislation (specifically Notice 459) and conclude that the respondent had no legal basis whatsoever on which to recommend these investments to his client, who had made it clear that she required a safe and guaranteed investment.

23. The respondent was aware of, or alternatively, had access to the fact that the complainant was the sole provider of her child and had no other provision for the child's education. The respondent was further aware that the complainant had no tolerance nor capacity to absorb the loss of her capital. Below, I analyse the risk involved in the two investments and conclude that the advice was in violation of Section 8 (1) (c) of the Code.

<u>Berg en Dal prospectus</u>

24. At the beginning of the prospectus[9] is a letter signed by the chairperson of the scheme, which states that the investment is "speculative". I have examined the respondent's documents and could find no evidence to support the appropriateness of a product that is speculative, given the complainant's expressed requirement for a safe and guaranteed investment.

25. The prospectus makes it plain that there was no independent board of directors. It also provides details that the directors of the promoter (Sharemax), were the same as the directors of the borrower and developer[10], both of whom were involved in this investment scheme. Given the absence of a board and the obvious conflict of interest (arising from the universal role of the promoter) it is clear that investors would have no protection whatsoever, as the directors would be accountable only to themselves.

26. The prospectus[11] stated that investor funds would be retained in an attorneys' trust account in a separate interest-bearing bank account (opened for each and every applicant), in terms of section 78 (2A) of the Attorneys Act, **until the share certificates had been issued** (in respect of successful

---

[9] Page 7 of the prospectus

[10] Refer in this regard to the Enterprise Enquiry done with CIPC on 14 August 2017

[11] Paragraph 22.10

applications). The funds, according to the prospectus, were to be advanced to the developer (Amber Sunrise).

The movement of the funds was illegal and in contravention of Notice 459[12], which specifically states that investor funds shall be paid out to the sellers only upon registration of transfer of the property into the name of the syndication vehicle. The respondent paid no attention to the contravention of the Notice.

27. The prospectus of Berg and Dal also tells us the directors had borrowing powers of 5% of the directors' *bona fide* valuations of the consolidated property portfolio of the Company. No evidence exists that the respondent had taken any step to verify the valuation of the property with any other property valuer. Neither is there evidence of the date of such valuation. The risk of over-valuation was not excluded, therefore, notwithstanding the potential harm to investors.

28. Paragraph 5.5.2.1 of the prospectus highlights the risk that the borrower (Amber Sunshine) to whom loan finance is advanced might default on its obligations or generate insufficient profits and be unable to make any payments. The directors of the Company (also the directors of Amber Sunshine) would ensure that an appropriate credit assessment of Amber Sunshine was undertaken. This is further confirmation that the directors were only accountable to themselves, as they would essentially be conducting a credit assessment on themselves.

Zambezi prospectus

29. From the onset, paragraphs 3.2 and 3.3.1 of the prospectus made it clear that the directors of Sharemax were also the directors of all the other Sharemax companies involved in the prospectus. When the universal role of the promoter and the glaring conflict of interest are considered, the investors were at the mercy of the directors.

30. Provision 4.3 of the prospectus gave clear indication that the directors would not comply with Notice 459. In this regard, investor funds were to be advanced to Zambezi (Pty) Ltd, a sister company, with the sole objective of lending the funds to Capicol, the developer, way before registration of the immovable property into the name of the syndication vehicle.

[12] See in this regard the Annexure for Berg en Dal, where Notice 459 is explained

Conflicting provisions of the prospectus

31. First, paragraph 19.10 states that funds collected from investors would remain in the attorneys' trust account and investors would be paid their return from the accumulated interest. Paragraph 5.11.2 on the other hand states that the funds would not remain in the trust account long enough to accumulate interest, since 10% would be released after the cooling-off period to pay commissions. The aforesaid is confirmed in the investment application forms completed by the complainant. This payment too is in violation of Notice 459.

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

    32.1 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 7.55% and 9.6%[13]. Sharemax promised up to 12%.

    32.2 The prospectus is unequivocal that the funds would not stay in the trust account long enough to have accumulated any significant interest since they had been withdrawn, first, to fund commissions and, subsequently, to fund the acquisition of the immovable property.

33. The prospectuses issued by The Villa Ltd[14] and Zambezi Ltd refer to a Sale of Business Agreement (SBA) concluded between Zambezi (Pty) Ltd and the developer Capicol, while The Villa refers to an SBA between Capicol 1 and The Villa Pty Ltd[15] . Two types of payments are dealt with in the SBA: payments to the developer and payments to an agent Brandberg Konsultante (Pty) Ltd. (Brandberg).

Payments to Capicol (Capicol 1 in the case of The Villa (Pty) Ltd)

34. According to the agreement, investors' funds were moved from Zambezi Ltd to Zambezi (Pty) Ltd and advanced to the developer of the shopping mall. At the time of releasing the prospectus of Zambezi

---

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

14 Another property syndication scheme promoted by Sharemax

15 Note that the SBA in respect of both entities, Zambezi (Pty) Ltd and The Villa (Pty) Ltd carried essentially the same terms but differed in terms of amounts. The developer however **was Capicol 1 in respect of Zambezi and Capicol in respect of The Villa**. Both the borrowers and lenders were represented by the same persons.

Ltd and The Villa Ltd, Sharemax had already advanced substantial amounts to the developer in line with this agreement. A brief analysis of the SBA reveals:

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

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

34.3 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.

34.4 The developer paid interest of 14%, from which Sharemax took 2% and paid the remaining 12% to the investors of Zambezi. There are no details regarding the economic activity that generated the 14% return paid by the developer.

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

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

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

36. 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

37. 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.

38. No valid business case is made as to why commission had to be advanced, in light of the risk to investors.

39. Neither was security provided against this advance to protect the investors' interests.

40. 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 the respondent, to foresee the harm and take steps to mitigate it accordingly[16].

41. After the attached summaries of the prospectuses, the analysis in paragraphs 24 to 38 as well as the applicable legislation had been considered, some questions arise that the respondent should have answered prior to considering this investment as appropriate. The questions are:

    41.1 The prospectuses of Sharemax Zambezi Retail Park Holdings Limited and Berg en Dal Residential Estate state 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 would be protected against director misconduct?

    41.2 Your attention is drawn to the various roles played by the promoter in both schemes. Are you able to provide evidence that you had ascertained the cost to be levied by the promoter for attending to roles such as property administrator, manager of investor funds, company secretariat and transfer secretary?

    41.3 The prospectuses further inform potential investors that there is essentially no independent board of directors. A clause stipulates that a new board would be elected on the date of the first meeting of shareholders. However, no proof exists that the election occurred. An additional statement is made about the current directors having to remain in addition to whoever would be elected. Given that there was no independent board of directors (as recommended in terms of good corporate governance; refer in this regard to the various King

---

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

reports) what steps did you take to satisfy yourself that your clients would be protected against director misconduct?

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

41.5 You should be aware that the oversight of a board includes satisfying itself that there are proper internal controls within the entity and that the information contained in the financial statements of the entity can be relied on. Given the absence of both a board and audited financial statements, what information did you take into account to conclude that this was a viable investment?

41.6 What steps did you take to understand the risk involved in this product?

41.7 Did you ever confirm the valuation figures shown in the prospectus with the property valuer cited in the prospectus, and what was the response hereto? We require the written response of the valuer.

41.8 You should be aware that Notice 459 mandates that investor funds must be kept in a registered or protected trust account until registration of transfer into the syndication vehicle or until underwriting by a disclosed underwriter with details of the underwriter provided, or until repayment to investors in the event of the syndication not proceeding. Given that the prospectuses make it clear that investors' monies would be advanced to a developer and/or the borrower, what made you recommend the products to your client in the face of the violation?

F. PRELIMINARY FINDINGS

42. On the basis of the reasoning set out in this recommendation, the risks in the investment were not disclosed, in violation of 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.

43. The respondent further violated the Code in terms of section 8 (1) (a) to (c), section 2 and section 9.

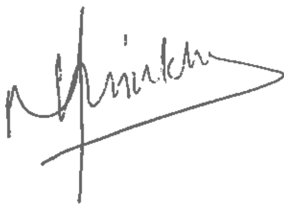
44. As a consequence of the breach of the Code, the respondent committed a breach of contract in that he failed to provide suitable advice. The respondent must have known that the complainant would rely on his advice in effecting the investment in Sharemax.

G. RECOMMENDATION

45. The FAIS Ombud recommends that the respondent consider the questions raised in paragraph 41 and pay the complainant's loss in the amount of R310 000.

46. The respondent is 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[17].

Yours sincerely



____

ADV M WINKLER

ASSISTANT OMBUD

---

[17] *"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…."