IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 09384/12-13/GP 1

In the matter between

SUSAN RIZZATO **Complainant**

and

DANIEL ENSLIN T/A ENSLIN BROKERS **Respondent**

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

A. INTRODUCTION

[1] Complainant invested in a Sharemax property syndication on the advice of her broker, the respondent. Complainant's funds were lost after Sharemax collapsed and there is now no prospect of her recovering any part of her capital. Complainant filed a complaint with this office.

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[2] Complainant invested an amount of R1 400 000 – 00 and agreed to abandon the amount in excess of R800 000 – 00. Consequently, this office has jurisdiction to deal with the complaint.

B. THE PARTIES

[3] Complainant is Susan Rizzato, a pensioner who resides in Garsfontein Pretoria.

[4] Respondent is Daniel Enslin a financial services provider of care of Attorneys Mostert and Bosman, 3 rd. Floor, MSP Chambers Tygerfalls Boulevard, Tygervalley, Western Cape. He is currently employed by Discovery Financial Consultants.

[5] Respondent was the sole proprietor of Enslin Brokers. Respondent was licensed by the then Financial Services Board with FSP No 27535. During June 2012, respondent's license was withdrawn due to non-payment of levies.

C. THE COMPLAINT

[6] Complainant met respondent when the latter was employed by FNB in Menlyn Square. Respondent assisted her with an investment in Rand Merchant Bank in an amount of R100 000 – 00. The investment was successful and complainant was pleased with the service rendered by respondent. Complainant developed a relationship of trust with respondent.

[7] Respondent was aware of the fact that complainant was expecting to receive funds from the sale of her property in Midrand. Respondent began to talk about Sharemax and he was very confident about this investment.

[8] Respondent then left FNB and moved to Port Elizabeth where he took up employment with Sharemax and managed their office in Port Elizabeth. Since moving from Pretoria, respondent telephoned complainant regularly to find out if her property was sold. He also told her he will make a much better investment for her in Sharemax and expressed confidence in the Sharemax product. Complainant states that she trusted Respondent and had no reason to question his recommendation.

[9] In 2008 Respondent moved to Cape town but continued to market Sharemax and kept in touch with complainant. In February 2008, complainant sold her property and invested the proceeds with Investec Bank. Later in the year, respondent called and requested a meeting.

[10] Respondent met with complainant in Pretoria and the purpose of the meeting was to persuade complainant to invest in Sharemax, respondent was aware that complainant had received her funds from the sale of her property. This was the only face to face meeting the parties had and according to complainant, respondent convinced her to invest in Sharemax.

[11] Complainant made it clear to respondent that she was going to invest her last remaining cash and she could not afford to lose it. She also alerted respondent, repeatedly, to the fact that she had no knowledge nor experience of finance and investments. Respondent assured her that Sharemax was “100% safe”. Respondent also informed complainant that if anything went wrong, he had insurance cover to protect his clients. This made complainant feel better. Complainant did raise some concern that she did not see that Sharemax was a registered financial institution. Respondent gave an assurance that he has been a Sharemax broker and the investment was safe.

[12] Respondent showed her a prospectus in which there appeared beautiful shopping malls which Sharemax built and managed with client investments with great success. The Sharemax option began to look like a good investment.

[13] Respondent convinced complainant that there was no risk in the investment as the buildings were in the process of being sold, documentation regarding the sale was already available. As soon as the sale goes through, Sharemax will repay the whole capital with interest.

[14] Complainant was not offered any other investment options by respondent except for Sharemax Zambezi Retail Park Ltd (Zambezi) on the bases that it was a safe investment. Complainant states that since she had no experience of investments, she decided to place her trust in a broker who will act in her best interests. Respondent had previously taken good care of her investment.

[15] In December 2008, complainant made an investment of R1.4 million in Zambezi. Her funds were obtained from Investec Bank and paid to Sharemax's attorneys.

[16] According to complainant she had no reason to mistrust respondent and took his advice to invest in Sharemax. She did not, at any stage, question his expertise and had no reason to mistrust him.

[17] After making the investment, complainant received her monthly interest from December 2008 till July 2010 when payments stopped. Complainant has since not received any further payments and as at this date, the capital can be considered as lost. Complainant seeks return of her capital.

D. THE RESPONSE

[18] Full details of the complaint were delivered to respondent with a notice that he had a period of six weeks within which to resolve the matter with complainant. The parties were unable to resolve the matter and a written response to the complaint was delivered to this office by respondent's attorney. The response took the form of a comprehensive affidavit, deposed to by respondent, to which supporting documents were annexed.

[19] Respondent denies liability for complainant's loss and maintains that at all material times he acted according to The Code of Conduct for Financial Services Providers (The Code) and was not negligent in advising complainant to invest in Sharemax Zambezi. His reasons appear in the affidavit.

[20] It is convenient for me to first summarise respondent's main submissions, then I will deal with each one.

[21] The material submissions are as follows:

a) Respondent submits that complainant's claim has prescribed in terms of the Prescription Act 68 of 1969. The investment took place on the 2 December 2008 and the complaint was lodged with this office on the 6 March 2013. Respondent submits that complainant presented no basis for showing that prescription was interrupted.

b) Respondent relies on the provisions of Section 27 (3) (a) of The Act to submit that this office does not have jurisdiction to entertain this complaint. Nor does the complainant state any justification to rely on Section 27 (3) (a) (ii). Respondent submits that the complaint should be dismissed on theses grounds alone.

Thereafter the respondent puts up his response to the merits of the complaint.

c) The first point taken is that this office must decline to investigate this complaint in terms of Section 27 (3) (b) due to the fact that as a result of intervention by the Reserve Bank, which intervention was sanctioned by the court.

d) Respondent admits that he was employed by Sharemax as its branch manager in the Southern and Eastern Cape and as such became "well acquainted" with Sharemax's investment products and its "exemplary investment track record". Respondent was also licensed to sell this investment in his own right. He is currently employed by Discovery as a broker.

e) Respondent met complainant in 2003 when he worked at FNB in Pretoria. He became aware that complainant had inherited a property worth about R6 million. Respondent told the complainant to contact him on sale of the property so that she could discuss investment possibilities with him.

f) On 2 December 2008 respondent met complainant at her house in Pretoria. Complainant had sold her property for R4 million. Respondent states that at the outset he inquired about her financial position "in order to assess her suitability to invest in a Sharemax product". Complainant informed that she had at least R200 000 as a reserve fund, which complainant advised her to place in a money market account. A risk assessment form was completed by complainant and respondent annexed a copy to his response. He refers to the contents of this form which was signed by complainant.

g) Respondent established that complainant was not solely dependent on the income generated from Sharemax. He points out that on the 1 January 2009 complainant elected to re-invest her income from Sharemax in the Premium Plan, a copy of the application form, signed by complainant, is attached to his response.

h) Respondent advised complainant to invest R1 million in Zambezi. This was 25% of the proceeds of the sale of her property. Respondent considered this as a suitable part of her “composite investment strategy”.

i) Respondent then set out the factors he considered in determining that this product was suitable for the complainant. They can be summarised as follows:

- Although complainant was not working, she was not without means or income. The property she sold was not her primary residence. The recommended investment was 25% of the proceeds of the sale of her property;

- Sharemax had a sound track record having successfully promoted 30 income plan property investments and more than 10 capital growth investments. Sharemax had syndicated more than R4 billion worth of projects. He states that since its inception every Sharemax venture had been successful and investors had always been paid timeously;

- Respondent then sets out a number of compliance requirements, which Sharemax had achieved, they are as follows:

- Sharemax was registered as a financial services provider and was assisted by reputable attorneys and auditors;
- The investment in shares was closely regulated by chapter 6 of the Companies act 61 of 1973. The prospectus was prepared by attorneys and registered by the registrar of companies in terms of section 155 of the act.
- Respondent refers to certain documents annexed to the prospectus; a valuation of the property by two independent valuators; the deed of sale of the property; a report by the auditors including a consolidated balance sheet and a due diligence report.

Respondent states that he was of the view that the contents of the prospectus were reliable and accurate

j) Respondent states that in December 2008 he could not reasonably have foreseen that the SARB would subsequently place all Sharemax companies under statutory management, as a result of “an unforeseen perceived regulatory risk”. This occurred two years later on 16 September 2010.

k) Respondent was informed in writing by Sharemax that a “large pension fund” made a written notice of their intention to offer to purchase Zambezi. The letter was annexed by respondent. Respondent was of the view that since there was interest from potential buyers, ameliorated the risk of the investment.

l) Respondent submits that he has demonstrated that the prospectus disclosed all the relevant information underpinning the investment. The complainant was handed a copy of the prospectus and respondent “expressly referred her to the salient parts thereof”.

m) Respondent refers to the prospectus and highlights the following:

- On the front page, and in bold, appears a warning that this investment is a risk to capital and should the company fail, investors will lose their investment;
    - Full details of the investment are stated and complainant “could be in no doubt as to the nature of her investment and the risks involved”;
    - Investors are warned that it is not the function of the promoter to find a buyer should the investor wish to sell the shares, and it is the investors responsibility to find a buyer;
    - The complainant was “fully aware” that performance of the product was not guaranteed, nor were the projected payments guaranteed;

- The prospectus states that the share price will be determined by market conditions and that the recommended investment period is not less than five years;
- The prospectus cautioned that there is a substantial risk that the investor may not be able to sell his shares; and
- There is a disclosure that the "company does not have any trading history".

n) Respondent submits there was a seven-day cooling off period and complainant had ample time to study the contents of the prospectus and raise any concerns she might have. According to respondent, under the circumstances, 'the risks inherent in the investment were fully disclosed to the complainant".

[22] The respondent then responded to the allegations made by complainant. Here I refer to the material parts of his response:

a) Respondent denies that the risks inherent in the investment were not explained. He points out that he provided a balanced explanation of the nature of the product, its advantages and disadvantages.

b) Respondent denies that he told complainant that the investment was 100% safe. He explained to complainant that this was not a conservative investment as the shares were unlisted. However, he still believed that the investment was suitable for her needs. He disputes that complainant invested the last of her cash.

c) Respondent admits that he advised complainant that Zambezi had an offer from a pension fund. He states that this reduced the risk in the investment.

d) Respondent is adamant that complainant, at all material times, was aware that he was a registered FSP.

[23] In the next part of his response, respondent deals with the letter he received from this office. I summarise as follows:

a) Respondent did not breach The Code and acted in the best interests of the complainant;

b) The flow of funds and the source of payments to investors is fully disclosed in paragraphs 4.2, 4.3, 4.8 and 4.14. Respondent then merely repeats what appears in these paragraphs. But significantly, respondent provides the following explanation: "*In terms of the sale of business agreement mentioned above, the seller, Capicol, paid to Sharemax Zambezi Retail Park interest on all amounts paid to the seller in respect of the purchase price, such interest calculated at the rate of 10% per annum paid monthly in advance from the date of payment of the deposit to date of transfer of the property in the name of Sharemax Zambezi Retail Park."*

[24] Respondent concludes that there was nothing remiss about the manner in which investors were to receive income. Respondent concludes that the complaint is without substance and falls to be dismissed. Respondent reserved the right to make further submissions if complainant placed further factual and legal material before this office. I state immediately that complainant did not place anything further before this office.

[25] Finally, respondent makes submissions regarding the quantum of complainant's claim. Respondent submitted that complainant suffered no loss to her capital and the latter must prove her loss.

E. RESPONDENTS QUALIFICATIONS

[26] Respondent was licensed in his own right to market the Sharemax product. This means that he had satisfied the FSCR that he is competent to provide financial advice in respect

of this category of investments. In other words, respondent was in possession of an advanced licence and capable of understanding the Sharemax product.

[27] Respondent has a BCom Honours degree, as well as a degree in Education. He began working as a broker for SANLAM in 1989 and held similar positions with ABSA and FNB. He was, shortly before he gave complainant advice, employed by Sharemax as a branch manager. On respondent's own version he was "well-acquainted" with the Sharemax product. For purposes of this determination I will consider respondent as a reasonably competent FSP who has good knowledge of the Sharemax Zambezi product.

[28] From respondent's qualifications and experience one can only describe him as highly qualified to do the work of an FSP. He had the capacity to understand the Sharemax product and be able to explain it to his clients in plain language. One must also accept that respondent understood the provisions of the Act and The Code.

[29] For purposes of this determination I will consider what a reasonable FSP, in the position of respondent in 2008, would have done regarding financial advice to invest in Sharemax. In other words, the issue is, what would a reasonably competent FSP, in the position of respondent in 2008, would have advised in assisting the complainant.

F. FINDINGS IN RESPECT OF RESPONDENT'S DEFENCE

[30] At this stage it is convenient to point out that it is undisputed that complainant made this investment as a result of advice she received from respondent. The issue is whether, I all the circumstances, the advice was appropriate, bearing in mind complainant's financial profile and her tolerance for risk.

It is equally not disputed by respondent that the Sharemax investment came with a number of risks and was not considered to be a conservative investment.

Prescription and Lack of Jurisdiction

[31] There is no merit in this defence. Complainant's claim did not prescribe. Respondents case is that any claim must have arisen on the date when the investment was made, namely 2 December 2008. The complaint was filed on the 6 March 2013 more than three years later. However, the complainants claim arose when she knew that there was something wrong with the investment or ought reasonably to have known that there was a problem. Complainant realised there might be something wrong when her interest payments stopped. That event happened in July 2010. Even if one considers this as the relevant date, then her complaint was within 3 years. We know that even in July 2010, Sharemax investors did not know what actually happened. They were finding conflicting information in the media. Even on respondent's own version, the trouble was started by the Reserve Bank and Sharemax was placed under "statutory management" on 16 September 2010. Even then many investors were kept in the dark by their brokers and Sharemax about what was happening. Respondent conveniently fails to say what he communicated to complainant after interest payments suddenly stopped. Complainant was left on her own. It is even possible that she found out about Sharemax's collapse long after September 2010, but there is no need to speculate, her complaint was filed within 3 years and this office has jurisdiction to investigate the complaint. See Sections 27 (3) (a) (i) and (ii) of the Act.

[32] The next point taken is in terms of Section 27 (3) (b) (i), respondent submits that the Reserve Bank's intervention was "sanctioned by a court of law". Respondent is vague and did not take the trouble to find out what intervention went to court. Even if it was the

Reserve Bank, and it was not, section 27 (3) (b) (i) does not apply. The act is clear, this office must decline to investigate if "*proceedings have been instituted by the complainant in any court"* (my emphasis). Respondent does not show that complainant started proceedings in a court. As a matter of fact, she did no such thing. Accordingly, I make a finding that this office has jurisdiction to investigate this complaint.

Respondents defence in this regard is dismissed.

Complainant's Personal Circumstances

[33] Respondent claims that the Sharemax investment was appropriate for complainant's needs. He carried out a risk analysis and was satisfied that the investment was appropriate for complainant. Respondent knew that complainant received R4 million from the sale of her property and advised her to invest 25% in Sharemax. He also established that complainant had liquid available funds in an amount of R200 000. Respondent states that he looked into complainant's financial situation in order to decide if the Sharemax product was suitable for her. He came to a conclusion that Sharemax was indeed suitable for complainant.

[34] Complainant was 61 years old in 2008, she is now 73. Her husband had passed away and she was unemployed. Complainant repeatedly told respondent that she could not afford to lose her funds. This was understandable in that she did not have any means of replacing lost capital. Respondent does not deny that complainant told him she cannot afford to lose her money. On respondent's version, he was aware of the risks inherent in the Sharemax product. As appears above, respondent refers to the prospectus and highlights some of the risks detailed in it. Respondent even alleges that he told complainant that this "was not a conservative" investment, and he is correct in his assessment of the product. Respondent, through his qualifications and extensive experience, must have realised that

complainant was nothing other than a conservative investor. The fact that complainant had other funds to rely on certainly does not change her profile nor does it entitle respondent to put her investment at risk. Respondent had known complainant for a long time, he knew she had no skills in finance, product experience and investment and was aware of the fact that she will trust his advice, without question. As she did. On respondent's own version, he must have known that this product was not suitable for complainant who had no tolerance for risk. What is plain, from the undisputed evidence, is that respondent called on complainant only for the purpose of selling her the Sharemax product. No other or alternative products were offered to complainant. Respondent was obliged to present complainant with alternative products and to assist her in making an informed decision. This was not done.

[35] While respondent diligently points out the risks, disclosed in the prospectus, there is no evidence that he explained the risks to his client. There is no record of advice that respondent took complainant through the prospectus, satisfied himself that complainant understood the product and acknowledged that she understood and decided to invest. Instead respondent merely relies on the fact that the prospectus was left with complainant and she had the cooling off period to read it and change her mind. This is unacceptable and in breach of the Code.

[36] On the probabilities, had respondent actually explained all the risks in Sharemax to complainant, the latter would not have invested. The probabilities favour her version that respondent told her this was a safe investment. If, for example, respondent explained that this investment was a risk to capital and that Sharemax Zambezi had no trading history and did not own any assets, complainant would not have invested.

[37] I must take into account that respondent was a highly skilled and experienced broker who knew his client well. He knew complainant was at best, a conservative investor. He must have known that Sharemax was inappropriate for complainant but he was driven by a lucrative commission (he effortlessly pocketed R84 000) and recklessly proceeded to take advantage of complainant's lack of experience and trust in him to sell her this high-risk product.

The Risk Analysis

[38] Respondent points out that he carried out a risk analysis by requiring complainant to complete "a written risk assessment form". This form is annexed by respondent. This is a standard Sharemax generated document and it is not a form designed to make an assessment of complainant's tolerance for risk. Instead this document is called "Sharemax Investments Risk Assessment on Product Information" (my emphasis). None of the questions in this document bears any relevance to client risk profile and tells one absolutely nothing about the client's tolerance for risk. Respondent is skilled enough to know this. Besides, to his own knowledge he was aware of complainant's risk profile. No where in his response does respondent suggest that complainant was assessed as a moderate or aggressive investor.

[39] On the evidence before me respondent failed to consider that this product was not suitable to complainant's risk profile. He therefore breached The Code. I also make a finding that a reasonably competent FSP, in the circumstances, would not have advised complainant to invest in Sharemax.

Sharemax's Track Record

[40] One of the reasons tendered by respondent for recommending Sharemax was the latter's outstanding track record. There is a serious flaw in this reasoning. Respondent, armed with his skills and experience, must have known that all previous Sharemax investments were different to Sharemax Zambezi; Sharemax had never previously marketed a product like this. In the past, Sharemax actually acquired immovable property, developed it, rented it out or the property had existing tenants then sold at a profit which benefitted investors. The prospectus must have informed the respondent that Zambezi was different and Sharemax had never promoted anything like it before. This time, Sharemax did not purchase property. The target property was owned by the developer. Further, investor funds were to be used to make an unsecured loan to the developer. The risks were enormous.

[41] I can find no record of advice where this was explained to complainant. Respondent was obliged to make a full and frank disclosure of all the information relevant to the product to his client. I am in no doubt that had respondent explained this to complainant, the latter would not have agreed to invest. The respondent contravened The Code and I further find that he acted negligently in advising complainant to invest in this high-risk product.

Compliance

[42] Respondent avers that he considered Sharemax to be a good investment as they were compliant with all the requisite legislation and regulations. He refers to the attorneys, auditors, Government Departments and the FSB (at that time) and points out that they gave Sharemax the stamp of approval and he was entitled to rely on this. This point is

unhelpful as the authorities sited do not provide product approval, nor do they carry out an analysis of the risks in the investment product.

[43] It is significant that, having read and understood the prospectus, respondent failed to see that Sharemax was going to be in blatant contravention of Notice 459. The prospectus actually states that after the cool off period, investors funds will no longer enjoy the protection of a trust account and their funds will be paid to the promoter who can use such funds at their discretion. This is illegal and places investor funds at risk.

[44] I see no record of advice that this illegality was drawn to the attention of complainant by respondent. The latter contravened the Code and has acted negligently in failing to tell his client that her money did not enjoy the protection of a trust account as promised.

The SARB

[45] Respondent states that he was not expected to reasonably foresee that the SARB would intervene thereby causing the collapse of Sharemax. This does not assist respondent. The test is not about whether or not he could have foreseen the actions of the Reserve Bank; the test is whether or not his advice was appropriate at the time the investment was made.

Offer to Purchase Zambezi

[46] According to respondent, what persuaded him that this was a safe investment was the fact that he was informed, in writing, by the directors of Sharemax that there was an offer, from a large pension fund, to purchase Zambezi. He annexes a copy of the letter. On a reading of the letter, the following appears:

a) It is dated 4 November 2008;

b) It is addressed to managers, consultants and financial advisers of Sharemax Investments;

c) It states that national chains and other businesses have signed lease agreements for premises;

d) It confirms that the building is incomplete and the expected completion date is end of 2009;

e) It informs that Sharemax is about to launch prospectus number 7;

f) It announces that a “groot pensioensfonds” (large or big pension fund) has made a written indication of its intention to make an offer to purchase the building. The reader is then invited to view this document at Sharemax’s head office.

[47] This document is extremely vague. It does not identify the pension fund and provides no details of the offer. The reader is left to speculate. Respondent did not take up the offer to view the offer made by the fund and merely accepted the contents of the letter. The letter also states that prospectus number 7 is due to be marketed, respondent should have questioned this as the prospectus he handed to complainant is number 10 and it wa valid until March 2009.

[48] Why this document made respondent feel more certain about the Sharemax product is unexplained. If anything, it raises more questions about the scheme.

Full and balanced explanation

[49] According to respondent, he gave complainant a full and balanced explanation of the product so that she was able to make an informed decision. Respondent relies heavily on the fact that he explained the contents of the prospectus to complainant. However, there

are, on respondent's own version, certain glaring omissions. There is no record of advice nor an explanation from respondent of the following material facts:

a) That respondent's commission was being paid out of investors funds, this is stated, in very small print, in paragraph 15 of the terms and conditions signed by complainant. Respondent did not point out to her that 10% of her funds was to be withdrawn after the cooling off period;
b) That the balance of her funds was not to be kept in a trust account pending transfer of the property, but was to be paid by the attorneys to the promoter for the promoter to use the funds at its discretion, this is stated in the terms and conditions and in the prospectus. That this is illegal in terms of Notice 459;
c) That the promoter was to make an unsecured loan, from investors funds, to the developer who was still building the mall and who still owned the property, this is stated in the prospectus; and
d) That investors were paid interest from interest payments made by the developer to the promoter in respect of the loan.

[50] If respondent complied with the Code, he would have made these disclosures, which disclosures he was enjoined to make in terms of Section 7 (1) (a) of the Code. Respondent breached the Code and deliberately withheld this information from complainant. Respondent cannot rely on complainant to read the prospectus and figure this out for herself. He knew that his client was not capable of reading and understanding the prospectus, the duty was on him to give complainant a full explanation and to make frank disclosure.

[51] It is clear, and I accept based on respondent's high qualifications and experience, that he read and understood the prospectus. At the time he gave the advice he was aware of

these facts. He must have been aware that this product is highly risky and not suitable for complainant's needs and risk profile. He nevertheless proceeded to advise her to invest.

The Flow of Funds

[52] Finally, I deal with an important part of this investigation. It was not in dispute that Sharemax had no trading history, no assets and no independent means to pay commissions and investor returns. This office wrote a letter to respondent in which, *inter alia*, he was requested to explain how Sharemax intended to make these payments. He was also required to state how he explained this to complainant. His response is quite telling.

[53] Firstly, he merely refers to certain paragraphs of the prospectus (4.2, 4.3, 4.8. and 4.14). He gives no explanation of his understanding of these paragraphs. Yet respondent expected complainant to read and understand it within the cooling off time after she already made the investment.

[54] Significantly, respondent (as I quoted above, but repeat for convenience) gives the following explanation:

> "*In terms of the sale of business agreement mentioned above, the seller, Capicol, paid to Sharemax Zambezi Retail Park interest on all amounts paid to the seller in respect of the purchase price, such interest calculated at the rate of 10% per annum paid monthly in advance from the date of payment of the deposit to date of transfer of the property in the name of Sharemax Zambezi Retail Park."*
>
> This explanation is not what one will find in the prospectus nor in the sale of business agreement. It also does not make commercial sense. Why would the seller of a property pay the purchaser interest on payment of the selling price?

[55] I have to accept that respondent read and understood the Sale of Business Agreement (SBA) which he confirms was annexed to the prospectus. This agreement discloses the following:

a) The promoter, Sharemax, will use investors' funds to make an unsecured loan to the developer, Capicol. The funds were intended to be used by the developer to fund the building of the Mall.

b) The developer paid the promoter 14% interest (not 10% as stated by respondent) on the loan amount;

c) An amount of 3% of investors' funds was paid to Brandberg as "agents commission";

d) Sharemax used the interest payments from Capicol to pay monthly interest to investors at a rate of 12% per annum, the interest was to be calculated on 100% of the investors' investment.

Respondent would have worked out that first 10% was deducted from investors' funds for commissions and administrative expenses, then a further 3 % was deducted as agents commission, finally 14% was paid by Capicol after they received a loan from investors' funds. The following must have occurred to respondent, who was a BCom honours:

a) By the time the loan was made to Capicol, 13% had already been deducted;

b) It was patently clear that Capicol did not pay interest from an independent source, they paid the 14% interest from the investors funds it received as a loan; and

c) When Sharemax paid their investors their monthly interest of 12%, this was calculated on 100% of the capital invested. Surely respondent must have worked out that this did not make commercial sense and was unsustainable. It must also have been obvious to the highly skilled respondent that in effect, investors were being paid from their own funds.

[56] Respondent denies that investors were paid out of their own funds in his response, but can provide no sustainable explanation for his denial. Respondent breached the Code in not disclosing these facts to complainant and he was also negligent in giving her advice to make such a risky investment.

G. THE LEGAL FRAMEWORK

[57] This matter must be determined with reference to the following legal framework:

a) The provisions of the Act, in particular section 16 (1) (a);

b) The provisions of the Code, in particular sections 2, 3, 7 and 8;

c) The common law relating to delictual liability; and

d) The common law relating to the contractual relationship between the parties.

H. THE ISSUES

[58] The issues for investigation and determination amount to this:

a) Did Respondent, in advising his client, conduct himself in terms of the General Code, in particular section 2; and

b) Did the Respondent actually comply with the provisions of the following sections of the Code:

Section 3 (1) (a) (i) and (iii) ; Section 7 (1) (a); Section 8 (1) (a) and (c) and Section 8 (2).

c) Did respondent act in breach of his contract with Complainant; and

d) Did Complainant suffer loss and if so, what was the cause of the loss and the quantum thereof.

I. APPLICATION OF LAW

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

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

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

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

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

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

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

[61] Further, this office as well as the Board of Appeal has consistently found that there existed a contract between FSP and client. It was an express, alternatively implied term of the contract that Respondent, in carrying out his obligations, will comply with the provisions of the Act and The Code. For reasons already stated, respondent was in breach of this term. A consequence of this breach was the loss of complainant's capital.

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

a) did the respondent comply with his legal duties towards the client; and
b) whether in terms thereof the respondent acted wrongfully and negligently.

[63] A reasonably competent FSP in the position of respondent would have done the following:

a) Carried out diligent research to become familiar with the nature of the Sharemax product he intended to sell, respondent acknowledged that he was well acquainted with the Sharemax product, but failed to explain it to complainant;
b) Would have found out that the Zambezi promotion was completely different to all the other property syndications Sharemax had promoted in the past;
c) As a basic step he was expected to read and understand the prospectus and the annexures thereto and explain it to complainant in plain language;
d) Made a point of understanding how Sharemax intended to pay his commission and investors returns bearing in mind that the latter owned no assets and enjoyed no trading history and did not have any independent means of making these payments (these facts are stated in the prospectus). Significantly, respondent had a duty to explain this to complainant;
e) Would have noticed that contrary to what was initially stated in the prospectus, it then informs that investor funds will not be kept in trust but will be paid out to the developer at the discretion of the promoter (this too is stated in the prospectus), this had to be explained to complainant;

f) Respondent knew that investor funds were going to be lent to the developer at an interest rate of 14% and that there was no security for the loan (stated in the prospectus), he was under a duty to inform complainant about this;

g) Would have called for and read the Sale of Business Agreement between the promoter and the developer (the agreement is in the schedules and annexures to the prospectus). Had he done so respondent would also have found out that 3% of the investor's capital was being paid out as "agents commission" and that was even before the money was lent to the developer, 10% was deducted by the promoter as administrative fees. The developer then paid the promoter 14% interest on the loan; a further 14% taken out of the capital. A reasonably competent FSP would have worked out that after 27% of the capital was deducted, investors were still going to be paid 12% interest on 100% of their capital. This was certainly not sustainable. (these facts are stated in the prospectus). Respondent failed to inform complainant of this;

h) Would have noticed that the shares will not be easy to dispose of, the promoter offered no assistance in disposing of the shares and the onus was placed on the investor to find a buyer (also stated in the prospectus).

[64] Clearly by failing to draw complainant's attention to the above information, respondent failed in his legal duties to his client.

[65] The respondent also acted wrongfully and negligently; he was under a legal duty to make a disclosure of these facts to complainant. Respondent acted negligently in not making full and frank disclosure thereby depriving complainant of the right to make an informed decision.

[66] The respondent must be judged by the standard of a reasonably competent FSP in the same circumstances. As I mentioned above, respondent must also be judged by the

standards expected of an FSP with similar qualifications and experience. Then the inquiry must progress to the next question: would a reasonably competent FSP have advised complainant differently. It is overwhelmingly clear that a reasonably competent FSP would have read and understood the prospectus and would not have advised a 61-year-old, unemployed person, to invest in a manifestly high-risk investment where there was a prospect of losing all the capital. The SCA in Durr v ABSA Bank, Schutz JA stated as follows:

"The reasonable person has no special skills and lack of skill or knowledge is not per se negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity."

"Liability *in delict arises from wrongful and negligent acts or omissions. In the final analysis the true criterion for determining negligence is whether in the particular circumstances of the conduct complained of falls short of the standard of the reasonable person."*

Respondent was the factual and legal cause of complainant's loss.

I refer to the following decisions:

OOSTHUIZEN v CASTRO AND ANOTHER 2018 (2) SA 529 (FS)

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

J. QUANTUM

[67] Respondent invested R1.4 million in Zambezi, she abandoned the amount in excess of R800 000. It is not in dispute that complainant has no prospect of recovering any part of

her capital. Sharemax was finally liquidated. This office is confined to making an order for the payment of R800 000 only.

K. THE ORDER

[68] In the premises, I make the following order:

1. The complaint is upheld;

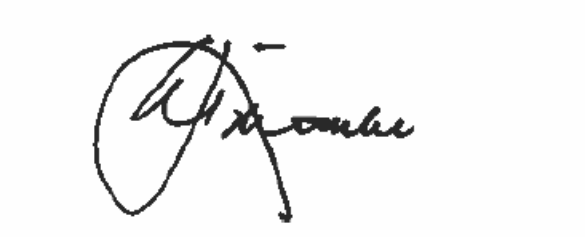
    1.1 Respondent is ordered to pay complainant an amount of R800 000;

    1.2 Interest is payable at 7% per annum on the capital amount from a date 14 days from serviced of this order to date of payment.

    1.3 Upon such payment, the complainants is to cede his rights in respect of any further claims to these investments to the respondent.

2. Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 27th DAY OF AUGUST 2020.



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ADV NONKU TSHOMBE

OMBUD FOR FINANCIAL SERVICES PROVIDERS