IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 05862/10-11WC1

In the matter between:

IONA COWAN	**COMPLAINANT**
and	
MARTHINUS DAVID RAS	**FIRST RESPONDENT**
PERFECSURE LEWENS (PTY) Ltd	**SECOND RESPONDENT**

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

A. THE PARTIES

[1] The Complainant is Mrs Iona Cowan, a pensioner residing in the Western Cape.

[2] The first respondent is Mr Marthinus David Ras, a director and key individual of respondent, and residing at 772 Norman Steet , Montana Park, Pretoria, Gauteng.

[3] The second respondent is Perfecsure Lewens Makelaars (PTY) Ltd a private company registered in terms of the laws of South Africa, and at all relevant times an authorised Financial Services Provider carrying on business at 772 Norman Street, Montana Park, Pretoria, Gauteng.

B. BACKGROUND

[4] The complaint relates to an investment in a failed Sharemax scheme known as The Villa. The Scheme has neither paid income, nor conducted any building activity on the site for several years, It is common knowledge that the building has deteriorated and is often occupied by vagrants.

[5] The nature of the investment; more specifically the risks inherent therein have already been elucidated in a prior determination, namely Barnes vs D Risk,[1] at paragraphs 16 to 24 to which the reader is referred. As I stated in Oldacre[2] vs D Risk these comments apply mutatis mutandis to all subsequent determinations.

[6] Quite succinctly, it was a risky, illiquid and unsecured investment in shares attached to one entity coupled to an 'unsecured floating rate claim acknowledgement of debt.' This single unlisted company was not subject to the stringent regulatory requirements of the Johannesburg Stock Exchange. In addition to having no track record and being devoid of any meaningful assets; the method of appointment of directors itself should have raised questions about corporate governance and investor protection.

1 Elise Barnes vs D Risk Insurance Consultants and Deeb Raymond Risk at paragraphs 16 to 24.
2 Oldacre vs D Risk Insurance Consultants CC and Deeb Raymond Risk FAIS 59821/10-11/KZN 1 and FAIS 5922/10-11/KZN 1

[7] The Villa differed materially from the usual property syndication scenario involving the purchase of an existing building and pre-existing rental income; which allows for an independent analysis of the viability of the scheme and valuation thereof, as well as a source of funds with which to pay investors an income. Given that the Villa had no income whatsoever other than investor's money; the inescapable conclusion is that no matter how it was packaged rental income was ultimately paid out of investor's capital. I would have expected that anyone required by the FAIS Act to exercise the requisite due skill care and diligence would have questioned the viability of such a practice particularly given that the Sharemax documentation makes reference to the fact that 10% of the share price will also be paid over to the promoters to be used as commission.

[8] Supposedly investors would still receive the full investment value because the commission would ultimately be paid by this very same promoter. This again raises the question as to just where these funds were to come from.

[9] The FAIS Act not only requires that the advice be appropriate but devotes a large portion of the General Code to required disclosures so as to enable the client to make an informed decision. It stands to reason that in order to make factually correct disclosures the service provider would need to ensure that he/she first properly interrogates and understand the product prior to making the required disclosures in respect thereof. In effect a proper due diligence must be conducted as I made mention of in the determination of Dudley and

Leisure Financial Services CC[3]. All of this must of course be accompanied by the requisite record keeping. Section 3.(2) (a) of the General Code requires appropriate systems in place to record verbal and written communications relating to the rendering of the financial service.

[10] With the preceding paragraphs in mind; for the most part many of the Villa complaints before the Office can be determined by applying the following questions which relate to the requirements of the FAIS Act.

10.1 Firstly did the adviser have not only the skill, but authorization from the Financial Services Board to render advice in respect of unlisted shares and debentures?;

10.2 Is there evidence that the adviser utilized this skill to conduct a proper due diligence/investigation of the scheme? It would be expected of a proper interrogation that the issues as already outlined in preceding paragraphs would be glaringly obvious;

10.3 Were these material aspects correctly conveyed to clients in a manner that they understood, as required by section 3 of the Code[4]?;

10.4 Was the client alerted to all monetary obligations, including the adviser's fees? Section 3.(1) (vii) of the Code requires disclosure in terms of fees, remuneration or monetary obligations mentioned[5]

10.5 The preceding two paragraphs should be considered with section 7.(1) (a) of the Code in mind which requires a reasonable and appropriate general

3 Dudley and Leisure Financial Services CC, FOC 0411/08/09 WC 1

4 S3 (1) (a) representations made and …
- (i) must be factually correct;
- (ii) must be provided in plain language….;
- (iii) must be adequate and appropriate in the circumstances….;

5 Similar to requirements as seen in section 7.(1) (c) (vi)

explanation of the nature and material terms of the relevant contract such that a client makes an informed decision;

10.6 This would include whether full and appropriate information in respect of any special terms, penalties, restrictions or circumstances in which benefits will not be provided; any restrictions on or penalties for early termination or withdrawal from the product and particularly material to the Villa scheme, any material risks associated with the product were disclosed[6]?;

10.7 The issues crystallized in paragraphs 6 and 7 supra, in particular the risks are pertinent to the disclosures required by sections 3 and 7 of the Code;

10.8 Even assuming adequate risk disclosure, consideration must be given to whether there was compliance with section 8 of the Code in so far as it pertains to suitability of advice. The question applicable here being whether the advice to invest in this risky product, aligned with client's needs and risk profile as established in terms of a proper analysis of the their circumstances and risk tolerance?;

10.9 Additionally in instances where there has been any replacement of an existing financial product, the code requires a comprehensive comparison between the old and new products. Where relevant was such a comparison conducted?;

10.10 In essence the enquiry is focused on whether the client made an informed decision as required by section 8.(2) of the General Code.

10.11 All of this must be evidenced by the record as required by section 9 of the General Code; with an explanation of what information and products were considered and why the products selected are suitable to client's needs and objectives.

6 Section 7 (c) of the Code

C. COMPLAINT'S VERSION

[11] In May 2009 she was advised by respondent to invest R800 000,00 in The Villa. As a recently bereaved widow, she failed to notice the lack of a financial analysis.

[12] In correspondence to the Office on 18th November 2010, complainant stated that she could not understand why respondent had put such a large portion of her capital into what was, considering her age, a very risky investment. Complainant added that respondent neither discussed nor presented any other options.

[13] Complainant's earlier correspondence addressed directly to 'Sharemax Investment (Pty) Ltd' on the 26th July 2010 posed the following questions:

13.1 On what basis were the recommendations made?

13.2 What other options were presented?

13.3 What financial analysis was done?

13.4 What commission did Mr Ras earn?

13.5 The cost implications of ending this investment?

[14] It was at all times her understanding that she was dealing with Mr Ras of Perfecsure. In her letter of 12 October 2010 she specifically refers to Mr Ras whose business is Perfecsure with FSP number 6845. The relevance hereof will become evident later in this determination.

D. RELIEF SOUGHT

[15] Complainant has asked to be put in the position she was in before the investment.

E. INVESTIGATION

[16] On the 10th November 2010 this Office addressed an email to 'Mr M.D.Ras Key individual Perfecsure Lewens Makelaars' requesting that he provide a comprehensive response to complainant's allegations. Furthermore it was requested that the financial needs analysis and risk profile, as well as the client advice record clearly indicating the basis for advising complainant to make the investment accompany his response.

[17] Having noted that his license had lapsed this Office requested clarification; specifically enquiring into additional entities that respondent purported to represent.

[18] Whilst respondent did not reply, correspondence directed to Sharemax Investments (Pty) Ltd was replied to by Gert Goosen, Director Compliance. In an email on the 10th November 2010, he advised this Office that the investment into 'The Villa Retail Park Holdings Limited was made by respondent on behalf of complainant. Apparently a Mr Gawie De La Bat had later taken over the management of Mrs Cowan's affairs.'

[19] Mr Goosen specifically stated that Mr Ras was neither employed nor a representative of Sharemax, a fact he reaffirmed via email on 16th November 2011 wherein he additionally made mention of Mr Ras being appointed as a representative under FSP number 6152[7] on 20th May 2009.'

[20] Whilst respondent may not have replied directly; attached to Mr Goosen's reply was documentation amongst which included correspondence from respondent[8]. This essentially contained respondent's version of events; the crux of which is detailed hereunder:

20.1 Respondent was informed by the executor of complainant's late husband's estate that complainant wished to make an investment to supplement her income;

20.2 At a meeting on the 24th May 2010 attended by complainant's son Mr Willem Cowan, he gave Mrs Cowan the prospectus for Villa Retail Park Holdings Limited 7 and explained that she could get 11.5% interest per year, the downside being that it was a medium to long term investment. Further he advised that the after tax returns of guaranteed or interest bearing investments were unlikely to beat inflation;

20.3 He enquired into whether she had an emergency fund to which she replied she had sufficient funds, including an amount of R100 000 which she intended to use use to modify her house by the sea into a guesthouse to supplement her income;

20.4 He allowed her time to read the prospectus and followed up on the 4th June

7 FSP NETWORK (PTY) LTD UNLISTED SECURITIES SOUTH AFRICA (USSA)
8 This is dated 26th May 2010

2009. Satisfied with the investment and its income, complainant signed the application forms at which point respondent went through the risk profile with her;

20.5 Additionally he went through her income and expenditure statement with her and noted that after the R7600 per month from Sharemax she would still have a shortage of approximately R1400 per month which would later be supplemented by the income from the guesthouse;

20.6 Respondent again saw complainant on the 10th May 2010 in Randfontein when she asked him what her options would be if she wished to sell her share. He advised her that another buyer would have to be found and that it would cost 10% of the investment unless he could find another buyer. He further informed her that if she wished to sell (at that time) she would likely lose a lot;

20.7 He believes that Mrs Cowan was given the best advice in light of her circumstances with her “request and acceptance of the contract’.

20.8 As for his licence, respondent stated that as a result of FSB criteria he was only registered by FSP Network (Pty) Ltd t/a Unlisted Securities South Africa (USSA) to do investments. However USSA had the incorrect email address and as a result he never received the disclosure documents, or he would certainly have had Mrs Cowan sign them.

F. DETERMINATION

LICENCE

[21] A letter from Sharemax to complainant dated 11th June 2009 reflects the date on which the investment was processed as being the 9th June 2009, whilst complainant mentions meeting her on the 24th May 2009 and again on 4th June 2009.

[22] Attached to a letter from Mr Goosen dated 30th November 2010 was a USSA application form signed by respondent on the 19th May 2009. Contained therein are two specific questions falling under a title 'EXPERIENCE SPECIFIC TO LISTED OR UNLISTED SECURITIES' I have reproduced both the questions and answers hereunder.

'For how long have you been marketing investments in respect of property syndication investments/ unlisted securities? Day/month/year must be indicated.

Give an indication of the total Rand value of the investments placed in property syndication investments/unlisted securities:

Answer to the first question: No

Do you have any experience with regard to listed securities? If yes, kindly indicate for how long you have been giving advice or managed portfolios in listed securities.

Answer : No.

[23] In short mere days after confirming that he had no experience in shares or

debentures respondent was advising complainant to invest almost half of her investable funds into an investment he really knew nothing about. Complainant is a widow of limited resources within which to see her through retirement.

[24] Perfecsure whilst a licensed financial services provider, as confirmed by the Financial Service Board was neither licensed to sell shares nor debentures, listed or unlisted.

[25] Respondent argued that the business was written under the license of USSA yet the complainant's understanding and the application form itself clearly reflect the adviser as Marthinus Ras of Perfecsure Lewens with no mention of USSA.

[26] Given the reference to USSA, enquiries were directed to Mr G. Goosen, previously a key individual of USSA. Mr Goosen replied on 30th November 2010. The crux of his response was that respondent was at the time a representative of USSA, however, complainant's business was not submitted under USSA but as confirmed by the documentation, under the name and licence number of Perfecsure.

[27] Section 5 of the Code requires that the service provider make a full written disclosure as to his status and contractual basis under which they operate, in order to make it clear to the client which entity accepts responsibility for the actions of the provider or representative in the rendering of the financial

service. This is a risk issue that a client needs to take into account right at the start.

[28] There is no question that at the time respondent rendered the advice he did so on behalf of Perfecsure, an entity not licensed by the regulator in terms of section 7 of the FAIS Act to render advice in respect of unlisted shares and/or debentures. In the instance there would appear to have been a contravention of section 36 of the FAIS Act.

[29] In turning now to the additional questions which I posed in paragraph 13 there is not so much as a satisfactory answer to even one of them. Respondent[9] makes mention of giving complainant time to go through the prospectus. Just what this achieved is a mystery. Respondent like complainant, has no experience in this field and the prospectus itself is both lengthy and highly technical. In short without someone sufficiently skilled to interpret and convey the essence thereof in a simple and meaningful manner to complainant, the prospectus on its own is meaningless.[10]

[30] Yet nowhere in any of the documentation are anyone of the material issues highlighted, specifically, the fact that she was committing a large portion of her retirement funds to a high risk investment.[11]

[31] There is no evidence whatsoever of any disclosure in respect of fees, commissions, method of termination or applicable penalties. The first mention

9 In his letter of the 26th May 2010 as attached to Mr Goosen's correspondence.
10 See paragraph 10.3 supra
11 See paragraphs 5,6 and 10.5 supra

of penalties occurs almost a year post the investment when respondent himself makes mention[12] of informing complainant on 10th May 2010, that to liquidate the investment, another buyer would first have to be found and that it would cost 10% of the investment.[13]

[32] Whilst no evidence of any risk profile has been provided, respondent makes mention of completing the risk profile at the time complainant signed the application forms; clearly a case of putting the cart before the horse. Even without the document itself, complainant's situation could in no way indicate an investor prepared to take risks in what amounted to a venture capital investment.

[33] Other than his own post event version there is really no record of what information or other products were considered; I say this particularly in respect of the question as to why given its inherently risky nature this product suited complainant's needs. This despite respondent being requested to provide the advice record clearly indicating the reasons upon which he based his advice.[14]

[34] As for the actual application forms, these were attached to Goosen's correspondence of the 10th November, although it appears to have originated out of facsimile from Perfecsure to Cowan's new adviser De Lat Bat.

[35] Whilst I make mention of certain aspects hereunder, the form in no way

12 Respondents letter dated the 26th May 2010 as attached to Goosen's correspondence.
13 See paragraph 10.4 and 10.6 supra
14 See paragraphs 10.8 and 10.11

further respondent's case, on the contrary it evidences the very lack of disclosure.

[36] A page of the application form contains 15 paragraphs, the last of being in small yet slightly bolder font makes mention that 10% of the investment will be paid over to the promoter as commission. It then goes on to explain how investors will still receive their full allocation as this same promoter will eventually pay all commissions. Despite what should have been obvious concerns about the viability of this practice there is no evidence that complainant's attention was drawn to this paragraph or for that matter any attempt made to interrogate or explain it.[15]

[37] A page headed client mandate contains 22 paragraphs within which are some general risk disclosures and disclosures in respect of unlisted property. These are however of such a small print as to be almost unreadable. Once again there is absolutely no indication that these were so much as drawn to complainant's attention, never mind explained.

[38] One of the last pages of the application form signed in full by both complainant and respondent contains several tick boxes with attendant questions such as, '*did the adviser provide you with a prospectus', 'did the adviser inform you that that the product should be seen as a medium to long term investment of no less than 5 years'* all of which are ticked yes. However, other than the duration of the term of the investment there is little that could

15 See paragraph 9 supra

be construed as educating complainant on what she was getting herself into.

[39] In summation I am more than satisfied that none of the requirements as detailed in paragraph 9 supra have been met. Quite simply there is no evidence whatsoever that complainant made an informed decision. In a letter dated the 18th November 2010 complainant states that she cannot understand why respondent placed such a large amount of her capital in such a risky investment. I cannot but echo similar sentiments.

[40] At this stage, I wish to make mention of an aspect of the correspondence from Mr Goosen.

[41] Mr Goosen, had in an email dated 16th November 2011 confirmed to the Office that respondent was not appointed by Sharemax Investments (Pty) Ltd as a representative in terms of section 13 of the FAIS Act. Therefore on the 16th November 2010 we posed the question 'If the latter (meaning Ras) was not appointed by Sharemax as a representative, please provide this office with the confirmation you obtained to ensure that Mr Ras was licensed to sell your investment product?' Mr Goosen in essence evaded the question and replied as follows:

'In order to sell products promoted by Sharemax Investments, a person needs to be a representative of a FSP that is licensed for financial products 1.8 and 1.10. The procedure followed by Sharemax Investments is that when a person wants to promote the products syndicated by Sharemax, they need to enter into an agreement with Sharemax, In addition to that they also need to provide proof that

they are licensed for financial products 1.8 and 1.10.'

[42] Respondent was not licensed in his own name but as a representative of USSA with effect from 20th May 2009 as confirmed by Goosen. Both USSA and Sharemax confirmed that the business was submitted in the name of Perfecsure, an unlicensed entity.

[43] Mr Goosen's correspondence of the 30th November raises further questions. I have detailed the relevant part of his response hereunder:

43.1 'USSA provided the brokers with a vehicle through which they could conduct their business within a legal framework……as it enabled the brokers who did not have financial products 1.8 and 1.10 on their own licenses at that time, to write business on the USSA license whilst obtaining the necessary experience……USSA did not act as a brokerage…..USSA did not receive any commission for any of the representatives on its register. **Sharemax entered into an agency agreement with every broker and in terms thereof dealt directly with the broker……USSA sent confirmation to Sharemax Investments (Pty) Ltd as and when a person become a representative on the register of USSA and as and when a person was removed….' (my emphasis)**

43.2 This was nothing short of the hiring out of a license for a small monthly fee. Whilst the letter goes on to make mention of a disclosure document that had to be signed and facsimiled back to client, this was a simple document and it is clear that the relationship was directly between the representative and

Sharemax itself.

G. QUANTUM

[44] In correspondence from respondent to complainant on 14th May 2010 he makes mention of her receiving R92 000 in interest at 11.5%. Yet post this, complainant has received neither income nor capital with little likelihood of ever recovering either.

[45] Complainant's R800 000 investment was made on respondents advice.

[46] Accordingly, and for the reasons already elaborated on, I find that the respondents are liable to compensate the complainant for her loss.

H. ORDER

In the result, I make the following order:

1. The complaint is upheld;
2. The respondents are ordered to pay, jointly and severally, the one paying the other to be absolved, an amount of R800 000, 00 within 14 days of the date of this order.
3. Interest on the aforesaid amounts shall accrue at the rate of 15.5% per annum to date of final payment;

Upon compliance with the order, the share certificate is to be tendered to

respondents according to payment.

DATED AT PRETORIA ON THIS THE 26th DAY OF SEPTEMBER 2012.

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NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS