IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 01900/12-13 FS 1

FAIS 01901/12-13 FS 1

FAIS 01417/12-13 FS 1

In the matter between

REMO EHLERS **Complainant**

and

ABE GOUWS MAKELAARS CC **First respondent**

ABRAHAM JACOBUS GOUWS **Second respondent**

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

A. INTRODUCTION

[1] This determination follows from a recommendation for settlement made in respect of section 27 (5) (c) of the Act on 25 July 2017, involving the parties below. The recommendation is attached for ease of reference.

B. THE PARTIES

[2] The complainant is Mr Remo Ehlers, an adult male pensioner whose full particulars are on file with this Office.

[3] The first respondent is Abe Gouws Brokers CC, a close corporation duly incorporated in terms of South African law, with registration number

(1993/017920/23. Its principal place of business is Negotium Building, c/o De Kaap en Buiten Streets, Welkom, 9459. The first respondent is an authorised financial services provider (FSP) with licence number 11991, which licence has been active since 23 December 2004.

[4] The second respondent is Abraham Jacobus Gouws, an adult male, key individual and representative of the first respondent. The regulator's records confirm his address to be the same as that of the first respondent.

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[5] The salient points of respondent's reply are summarized below:

5.1 The Sharemax investment no longer exists as a result of the scheme of arrangement and subsequent intervention of the Nova Property Group (Nova), managed by Frontier Asset Management and Investments[1]. The aim of this arrangement is to ensure repayment of investors' funds within yearly intervals[2]. Complainant and other investors agreed to this arrangement.

5.2 Respondent claims that he complied with the Code because he considered complainant's needs at the time when deciding what type of investment would give complainant better income. An analysis in terms of section 8 (4) (a) could not be conducted as complainant did not provide sufficient information to proceed. This was duly noted in the record of advice.

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1 The directors of the Nova Property Group and Frontier Asset Management and Investments are none other than the former directors of Sharemax. See in this regard the confirmation from CIPC. Investors' money have not changed hands.

2 A schedule attached to the response indicates an expected repayment date for The Villa of 2022.

5.3 Respondent perceived the investment in The Villa to be safe as he visited the construction site to ensure that it was in fact being built.

5.4 Respondent is of the view that it is unfair that he was expected (after conducting due diligence) to ensure that the directors of Sharemax did not violate Notice 459 and that they followed the rules of the prospectus to, amongst others, keep investors' funds in trust.

5.5 Respondent accepted that all the provisions in the prospectus were correct, and in line with the relevant laws, because of the approval of the prospectus by the Department of Trade and Industry. To this extent, respondent claims it cannot be expected of him to be an expert on the provisions of the prospectus. The same argument was raised in respect of the agreement with Capicol.

5.6 Respondent stated that he advised complainant to invest in The Villa because it was a safe investment which he perceived to be low risk. In contrast however, respondent noted further on that the risks were clearly stipulated in the prospectus of which complainant had a copy. These risks were explained to complainant.

5.7 Respondent concludes that complainant was fully aware of the risks relative to the investment, especially because he had also worked as a financial advisor years before. Respondent claims that he did not cause the loss since the investment failed not owing to it being inferior, but because of the intervention of the SA Reserve Bank.

D. FINDINGS

[6] It is concerning to note that, despite the overwhelming evidence provided in the recommendation letter which included a summary of the relevant prospectus, (and pointing to the provisions that conveyed the directors' intention to pay investor funds to a multiplicity of third parties to fund amongst other, commissions, and commission to agents such as Brandberg), that respondent still fails to see the obvious high risk, and therefore the inappropriateness of the product in relation to complainant's specific circumstances, and specific request for a safe investment.

[7] Below, I briefly comment on the remarks made by respondent:

7.1 Regardless of who (in respondent's view) holds complainant's shares in The Villa, it does not deter from the fact that complainant has not seen a single cent of his funds since the monthly payments ceased, nor a return of his capital. I refer in this regard to the communique circulated to share and debenture holders by Nova during May 2016, confirming that the Nova Board made a decision in 2013 to reduce and / or cease the projected monthly return payments, and utilise these funds for repairs and maintenance. The letter also points to the ongoing litigation between The Villa and Capicol. There can be no other conclusion than that complainant lost his investment. Respondent should also be aware that Sharemax was finally liquidated a long time ago. There is simply no prospect that complainant will ever receive his capital.

7.2 The record of advice alluded to by respondent does not assist him. The record confirms that respondent's only recommendation was to invest in

The Villa. There is further no compliance with section 8 (4) (a), since the particular section is marked “not applicable”.

7.3 I reject respondent’s statement that he cannot be held liable for the transgression of Notice 459 and non-compliance of the directors. Respondent still fails to see that by the time he presented the prospectus to his client, the directors were already contravening the law. The prospectus provides in paragraph 4.3 that certain large amounts had already been advanced to Capicol via The Villa (Pty) Ltd for the construction. What further proof did respondent require to satisfy himself as to the risks involved in this investment? Furthermore, a basic knowledge of corporate governance would have alerted respondent to the fact that nothing healthy could come from an investment where the directors, at every level, are accountable only to themselves.

7.4 Based on respondent’s contention that he considered an investment in Sharemax to be low risk, I can only conclude that respondent did not understand the content of the prospectus and the implications for investors.

E. CAUSATION

[8] The principles of causation were explained in *International Shipping Co (Pty) Ltd v Bentley*[3]*:*

[3] 1990 1 SA 680 (A) [700 E-G]

"The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question".

[9] As was explained by the court in *Minister of Finance & others v Gore NO*[4], "*[A]pplication of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences".*

Or, as was pointed out in similar vein by Nugent JA in Minister of Safety and Security v Van Duivenboden[5]*:*

"A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics[6]*".*

[10] Had respondent truly appreciated what he was advising complainant to invest in, he would have steered him in a different direction. Not only was the loss to investors reasonably foreseeable, it was inevitable.

[11] Complainant's loss was not caused by management failure at Sharemax or the intervention of the Reserve Bank, but respondent's inappropriate advice. If respondent had adhered to the Code, no investment would have been made in

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4 Minister of Finance v Gore NO 2007 (1) SA 111 (SCA) para 33.

5 Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) para 25.

6 Crafford v South African National Roads Agency Limited (215/2012) [2013] ZASCA 8 para 7

Sharemax. Complainant sought an investment that would keep his capital intact. The prospectus is clear in its wording that the shares on offer are unlisted and that the investment must be seen as a risk capital. That is not all: for all the reasons mentioned in the recommendation, the investment was high risk and inappropriate for complainant. That the risk actually materialized, for whatever reason, is not important. Otherwise the whole purpose of the Act and the Code would be defeated. Every FSP can ignore the Act and Code in advising clients and hope that the investment does not fail. When the risk materializes and results in loss, they can hide behind unforeseeable conduct on the part of product providers.

[12] The findings made in the recommendation letter are hereby confirmed[7].

[13] There is one more issue that must be dealt with: the recommendation letter required respondent to revert to this Office within TEN (10) days from date of the recommendation letter but interest is meant to run from SEVEN (7) days from date of the recommendation letter. This must be corrected. Interest runs from date of determination.

F. THE ORDER

[14] In the result, I make the following order:

1. The complaint is upheld.

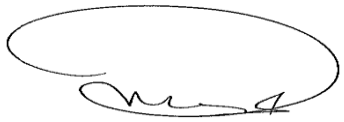
2. The respondents are ordered to pay the complainant, jointly and severally, the one paying the other to be absolved, the combined amount of R420 000.

[7] See paragraphs 40 - 47

3. Interest on this amount at a rate of 10.25% per annum from the date of determination to date of final payment.

4. Complainant is to cede his rights in respect of any further claims in respect of this investment to respondents.

DATED AT PRETORIA ON THIS THE 29th DAY OF AUGUST 2017.



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