**THE OFFICE OF THE FINANCIAL OMBUD FOR FINANCIAL SERVICES PROVIDERS PRETORIA**

**CASE NUMBER: FAIS 00831/13-14/ FS 1**

**In the matter between:**

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|---|---|
| **REINETTE HEYNS** | **Complainant** |
| **and** | |
| **C J DE LANGE BROKERS CC** | **First Respondent** |
| **CHRIS DE LANGE** | **Second Respondent** |

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

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## A. INTRODUCTION

[1] The complaint is about a failed investment in Sharemax. The investment was made on the advice of respondent.

[2] Since January 2010, exactly three months after making the investment, complainant stopped receiving interest. Complainant is of the view that she has lost her investment as a result of following respondent's advice, which complainant claims was flawed. She asks this office for a finding that respondent repay her the full amount of her investment.

[3] For reasons that follow, I am satisfied that Respondents have failed to comply with the sections 2, 8 (1) and 9 of Part VII of the General Code of Conduct.

## B. THE PARTIES

[4] Complainant is Reinette Heyns, an adult female shop assistant, residing at 7 Berg and Dorp, Ds. Paul Roux Street, Senekal.

[5] First respondent is C J de Lange Brokers CC, a close corporation duly registered in terms of the laws of South Africa, with its principal place of business at 8A Gibbon Street, Kroonstad. First respondent is an authorised financial services provider ("FSP") in terms of the FAIS Act. Respondent's license was issued on 08/09/2009 under reference FSB 40196. In terms of the license first respondent is authorised to render financial services in terms of categories 1.8 and 1.10, which relate to the rendering of advice and or an intermediary services in terms of shares and debentures.

[6] Second respondent is Chris de Lange, an adult male, member and a key individual and authorised representative of the first respondent. At all material times, complainant dealt with second respondent. I refer to first and second respondents as respondent, where appropriate, I specify.

## C. FACTUAL BACKGROUND

[7] On or about September 2009, complainant approached the second respondent for investment advice. She had been introduced to second respondent by her parents.

At the time, complainant had R 600 000.00 which was part of her divorce settlement.

[8] Complainant and first respondent entered into and signed an Agreement of Advice, (agreement) on 13 October 2009. Attached to the agreement is a Risk Analysis Form, (risk analysis).

[9] Pursuant to first respondent's advice, complainant, on 15 and 22 October 2009, deposited the amounts of R100 000.00 and R500 000 respectively in the trust account of Weavind and Weavind Inc., the designated attorneys for the Sharemax Investment (Pty) Ltd ("Sharemax") syndication. The total investment was R600 000.

[10] The investment went into Sharemax the Villa Retail Park Holdings Limited 14 ("The Villa")**.** Upon payment of R600 000, Sharemax issued complainant with six hundred (600) unsecured and unlisted shares on 10 December 2009.

## D. THE COMPLAINT

[11] Complainant alleges that in September 2009 she approached respondent for financial advice. Respondent, according to complainant, immediately suggested Sharemax. Indeed, the Sharemax investment came highly recommended by respondent, along with the assurances by respondent that the investment came with no risk. According to respondent, Sharemax was a safe option, says complainant.

[12] The terms of the investment were as follows:

i) the investment was for five (5) years;

ii) interest of 12 percent per annum would be paid within the first 12 (twelve) months of the investment; and

iii) upon occupation of the building, interest would be 11,5 percent per annum.

[13] Sometime in January 2010, respondent telephoned complainant and informed her that Sharemax was in financial trouble. Complainant claims she requested more information from respondent but the latter was not forthcoming. He simply suggested that they should wait. Round about that same time, the media was awash with articles about Sharemax and its financial woes.

## E. RELIEF SOUGHT

[14] Complainant is of the view that respondent should pay her for the lost investment and accordingly seeks payment in the amount of R 600 000.00. Complainant's view is that respondent violated the Act and Code when he recommended the investment to her.

## F. RESPONDENT'S RESPONSE

[15] On 29 June 2015, following referral of the complaint to respondent in terms of Rule 6 (b), of the Rules on Proceedings of this Office, (Rules), this office sent a notice in terms of section 27 (4) of the FAIS Act to respondent, (the notice).

[16] The notice informed respondents as follows:

*The complaint relates to an investment in the Villa Retail Park Holdings, a property syndication scheme promoted by Sharemax Investments (Pty) Ltd.*

*The prospectuses of both the Villa Retail Park Holdings as well as Zambezi Retail Park Holdings declare that the respective entities have never traded prior to the registration of the prospectus, have not made any profit whatsoever and are still under construction.*

*16.1 In the circumstances how did you expect the income to be paid, other than out of investors' money?*

*The prospectuses refer to the investment as being in an* ***unsecured subordinated*** *interest rate acknowledgment of debt linked to a share; which share was in an entity still under construction. Additionally the registrar of companies within the prospectus states 'that the shares on offer are unlisted and should be considered as a risk capital investment.'*

*16.2 Given the preceding paragraphs please advise as to why you considered the investment to be anything less than an extremely risky venture, without any substance to its guarantee on interest payments?*

*16.3 Was your client properly apprised of these risks? Please provide evidence to this effect.*

*16.4 What information did you rely on to conclude that this investment is appropriate to your client's risk profile and financial needs? In this regard your attention is drawn to the provisions of section 8 and 9 of the General Code. (Note: The record we are looking for must have been compiled at the time of advising your client. A post facto account will not be accepted.)*

16.5 *Should you have acted in a representative capacity in rendering the advice, full details thereof are required, along with any supporting documentation.*

16.6 *We require a copy of your license to demonstrate you were licensed to render financial services to clients in respect of this product.*

[17] The salient features of respondent's response are outlined hereunder:

i) At the outset, respondent denies that he met with complainant only once. He asserts that he met complainant twice, in Kroonstad and also in Senekal to finalise the investment.

ii) According to respondent, he discussed the different options with the complainant's father, which included The Villa. He believed complainant came to see him on the recommendation of her father.

iii) Respondent states that he completed the application form on 13 October 2010 and the funds (R 100 000 and R 500 000), were invested on 15 and 22 October 2009, respectively.

iv) Respondent further claims that he furnished complainant with the Villa prospectus. He says he assumed and accepted that any investor who invests such a large amount of money would have studied the prospectus thoroughly.

v) If complainant had a complaint about the investment, she had a cooling off period of 14 (fourteen) days within which to cancel the investment. The suggestion here is that complainant did not cancel, therefore, respondent cannot be blamed.

vi) Respondent further states that he gave complainant alternative investments including five-year investments, which were available in insurance

companies at a relatively low interest rate. But these would have meant that complainant would have waited for five (5) years before she could receive an income.

vii) Respondent denies that he said that there was no risk involved in the investment. He refers the complainant to the agreement, to which he had attached the risk analysis he had performed.

viii) Respondent asserts that he based his recommendations on the following grounds:

[18] Sharemax had a licence for years and the Council on Financial Services (CFS) (should be the Financial Services Board, 'the FSB') had renewed Sharemax's license annually.

[19] Had the FSB had any problems with Sharemax, it would have suspended the latter's licence.

[20] At the time of the investment, the South African Reserve Bank ("SARB") did not have any problem with Sharemex. It was only after the investment had been made that SARB objected to Sharemax's contravention of the Banks Act. Since SARB's objection in 2010, no court of law has pronounced on the matter, claims respondent.

[21] The Department of Trade and Industry, through CIPRO, had issued a certificate in every prospectus, signed by the Registrar of Companies which, states that *"the offer of shares in terms of section 146 of the companies Act of 1973….lodged by you in respect of the above company, has this day been registered"*.

[22] To have approved the offer, the Registrar of companies carried out *"due diligence"* to determine the sustainability of the project, claims respondent. On the grounds of this certificate, he mentioned to complainant that he did not think that there was risk attached to the investment.

[23] According to the Sharemax consultant who visited respondent for the last 8 eight years, complainant would have been able to withdraw the income before the five years expired.

[24] The recommendation of Sharemax's investment to complainant was also informed by statements from the following institutions and persons:

24.1 The auditors: ACT Audit Solutions;

24.2 The valuers: W G Haese and partners;

24.3 Another valuer: S J Eloff;

24.4 Attorneys Weavind and Weavind;

24.5 Standard Bank.

[25] Respondent denies complainant's allegation that very little communication happened from his side when the investment floundered. He asserts that he communicated the little information that he received from Sharemax and later, from Frontier Asset Management ("FAS").

[26] In conclusion, respondent denies that he contravened the FAIS Act and General Code of Conduct.

## G. DETERMINATION

[27] There are three issues to be decided, namely:

27.1 Whether respondent, in rendering the financial service, had failed to comply with the code.

27.2 In the event it is found that respondent failed to comply with the FAIS Act and/or the Code, whether such conduct caused the damage or loss complained of; and

27.3 Quantum

***Whether respondent in rendering financial services to complainant had failed to comply with the Code? Simply put, was the advice suitable to complainant's circumstances?***

[28] The notice sent to respondent in terms of section 27 (4) on 29 June 2015, posed a number of questions to respondent and pertinently invited respondent to support his response with his record of advice, as required by section 9 of the Code. No records were provided by respondent. This would suggest that respondent failed to record his advice in contravention of the Code.

[29] That is not all. Notwithstanding the narrative provided by respondent as to his reasons for believing that the Sharemax investment carried no risk, respondent knew or ought to have known that the Sharemax shares were unsecured and unlisted, and therefore high risk.

[30] There is a further reason why respondent should have known that the shares offered by Sharemax were high risk; the prospectus plainly communicated as much.

[31] The properties were further at construction stage and had never traded; another reason to regard the shares as high risk.

[32] Respondent in his response, despite being pertinently asked, never dealt with the question of how the two entities paid returns while they were still being constructed.

[33] Beyond the construction of the two properties, respondent could not explain what the Sharemax business model consisted of, which made it possible for them to pay double digit returns, this in an economic climate where far larger traditional institutions, also concerned with leasing properties, were struggling to maintain upper single digit returns.

[34] Accepting that respondent was fully aware of the high risk nature of the Sharemax the Villa investment, respondent performed a risk analysis to determine the risk tolerance or capacity of complainant on 13 October 2009. The result of the risk analysis was that complainant is a *careful investor*.

[35] Undermining the result of his own analysis, respondent still recommended the investment to complainant. This is an affront to provision 8 (1) (b) and (c) of the Code.

[36] Complainant specifically alleged that in their very first meeting, *"he immediately suggested that I invest in Sharemax and he highly recommended it…"* In his

response, respondent failed to contradict this serious allegation and it remains uncontroverted.

[37] The only rational explanation to respondent's conduct of recommending the investment without carrying out the statutory duties set out in section 8 (1) (a) to (c) of the Code is that respondent was attending to his own interests. To this end, the lucrative commissions paid by Sharemax to intermediaries come to mind. These had no claw back provisions. Put differently, respondent was intent on selling the Sharemax product regardless of the outcome of any risk profile or needs analysis.

[38] When respondent was confronted with an allegation that he did not provide complainant with alternative financial products, his response was weak, contradictory and not persuasive. First, respondent stated, *"Your father also came to see me, discussed your position to me and listened to the different option which I mentioned to him, inter alia The Villa and that I believe that you came to see me on his recommendation".*

[39] It is common cause that it was not complainant's father who required financial advice. The father was never a party to the agreement. It is surprising that the respondent would even refer to his meeting with complainant's father to prove what would ordinarily constitute advice. The record of advice required by section 9 of the Code is exactly for this reason, to demonstrate the process followed in advising a client. In addition, respondent concedes that when he presented the options to the father, complainant was not there. On his own version, respondent violated the Code because he failed to consider the personal circumstances of complainant.

[40] The second version proffered by respondent states, *"…Remember that I mentioned 5 year investments which were available at insurance companies, but a relatively low interest rate, you would have had to wait until the end of the 5 year period if you needed an income…"*.

[41] Up to this point, no record has been provided to support any of these claims. Respondent cannot expect this office to overlook that he demonstrated nothing but scorn for the law. The record in terms of section 9 should have been maintained.

<u>Use of names of regulatory organs to promote the Sharemax investment</u>

[42] Respondent boldly asserted that he recommended Sharemax to complainant because, amongst others, the registrar of companies must have conducted "due diligence" in order to approve the offer made by Sharemax to investors. If there was ever doubt that respondent had not read the prospectus, it must now be laid to rest. The prospectus makes it plain that the registrar carries no such activity and bears no such responsibility. This was for respondent to do. Simply off-loading his duties in terms of the Code will not avail respondent.

[43] Respondent further made statements about the Regulator's renewal of Sharemax's FSP license claiming that if the regulator had a problem with Sharemax, they would not have renewed the latter's license. Respondent had a duty to investigate the product offered by Sharemax and understand the risks associated with it before advising his clients to invest in the product. It is clear that apart from these baseless statements, respondent did no such work. Had respondent asked himself one simple and very basic question, 'how does a building in construction manage to

pay a return to investors?' The answer would have immediately come to mind and right there and then, respondent would have steered clear of the investment.

[44] He further claims that though SARB had objected to Sharemax's violation of the Banks Act, that objection is yet to be tested in court. The less said about these reckless statements, the better. Respondent's statements are incorrect, unreasonable and display lack of care, skill and diligence to say the least. What remains undisputed at this stage is that respondent failed to conduct an independent assessment of the Sharemax product.

[45] Respondent's conduct of merely taking things at face value, without interrogating the role of the various institutions referred to in the Sharemax prospectus was negligent. What then constitutes negligence? The lack of skill or knowledge is not per se negligent. It is however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with proper discharge of duties connected with such activity[1].

Causal link between the Negligence and Harm

[46] It is not enough to establish that respondent was negligent or violated the Code, in that he engaged in an activity in which he did not have the requisite skill and knowledge. Our authorities have long established that there must be a factual causal link between the negligence and the harm recognised by law (legal causation). In **INTERNATIONAL SHIPPING COMPANY (PTY) LTD V BENTLEY** [2], the court held as follows:

[1] Durr v Absa Bank 1997 93) SA 448 SCA 448 at 452
[2] 1990 (1) SA 680, pg 700

> *"…If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz* ***whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote****…" (Emphasis mine).*

[47] On the circumstances of this case, I am satisfied that the loss suffered by complainant was as a direct result of respondent's negligent conduct and failure to abide by the Code. In this regard, had respondent carried out his duties in terms of sections 2, and 8 (1) (a) to (c), no investment would have been made into Sharemax the Villa.

[48] I am further satisfied that it is not anything that happened at Sharemax that caused complainant's loss but respondent's unlawful conduct of recommending an investment he could not understand.

[49] No amount of attempting to shift respondent's duties and blaming regulators will change the facts of this case.

[50] Complainant's loss was caused by respondent.

## H. FINDINGS

[51] On the facts before me, I make following findings:

51.1 I find that Respondents, in violation of the Code, advised complainant to invest R600 000.00 in The Villa without first identifying the financial product or products that will be appropriate to the complainant's risk profile and financial needs, thereby contravening Section 8(1) (a), (b) and (c) of Part VII of the General Code of Conduct.

51.2 Respondents had no appreciation of the risk involved in Sharemax at the time.

51.3 Respondents in violation of their duty as set out in section 2 of the Code, failed to conduct due diligence on the Sharemax investment.

51.4 In further violation of their duty as set out in section 2, respondents were not candid with complainant, in that they failed to disclose their limitations in terms of appreciating the risk involved in Sharemax.

51.5 Respondents further failed to maintain a record of advice which should have reflected the basis on which the advice was given, thereby contravening Section 9(1) (a)-(c) of the Part VII of the Code.

51.6 Respondents failed to render financial service honestly, fairly with due skill, care and diligence and in the interests of client and integrity of the financial services industry thereby contravening Section 2 of Part II of the General Code of Conduct.

51.7 In the light of the foregoing, the Respondent's conduct resulted in the complaint's financial loss.

## I. QUANTUM

[52] Complainant invested an amount of R 600 000.00 in The Villa. There are no prospects of ever recovering the money from Sharemax.

[53] Accordingly, an order will be made that the Respondents pay to the complainant an amount of R600 000-00 plus interest.

## J. THE ORDER

[54] In the circumstances, I make the following order:

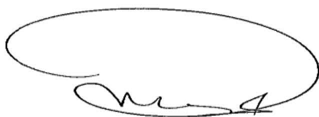
1. The complaint is upheld.

2. Respondents are ordered to pay complainant, jointly and severally, the one paying the other to absolved:

   2.1 the amount of R 600 000.00.

3. Interest on the amount of R 600 000.00 at the rate of 10.25 % per annum, calculated from a date, seven (7) days from date of this order to date final of payment.

**DATED AT PRETORIA ON THIS THE 9th DAY OF MAY 2016.**



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**