THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBERS: TPM FAIS 00493/13-14/KZN 1

In the matter between:

LEONIE LANDMAN **Complainant**

AND

JOHANNES CHRISTIAN MOSTERT **Respondent**

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

A. INTRODUCTION

[1] The brief history of this matter is as follows:

a) On the 5 May 2016 this office upheld a complaint made by the complainant and ordered respondent to pay an amount of R650 000;

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b) Respondent made an application to take the matter on appeal to the then Board of Appeal alleging that he was treated unfairly as this office had failed to take his version of the facts into account. After investigating the matter, this office found that due to an administrative error, respondent's response was filed incorrectly and the determination was made on the basis that respondent had elected not to respond;

c) As a consequence, this office granted leave to appeal and recommended to the then Board of Appeal that the determination be set aside and the matter referred back to this office;

d) On the 25 January 2018 the Board set aside the determination and made the following order:

[25] As a result of our conclusion the appeal on the prescription issue cannot succeed and is dismissed, the following order is granted: -

[25.1] The appeal is upheld;

[25.2] The determination made by the Ombud on the 5th of May 2016 is set aside;

[25.3] The matter is remitted back to the Ombud for further consideration;"

e) This office then proceeded to reconsider the matter after taking respondent's representations into account. On the 14 August 2018, this office upheld the complaint and ordered respondent to pay an amount of R650 000 plus interest to complainant;

f) This determination was referred to the Financial Services Tribunal (Tribunal) which succeeded the Board of Appeal when the Financial Sector Regulation Act of 2017 (the FSR Act) was promulgated. The referral was an application for reconsideration in terms of Section 230 of the FSR Act. On the 21 October 2019 the Tribunal set the determination aside and remitted the matter back to this office in terms of Section 234 (1) of the FSR Act.

Basis for Finding

[2] It is important to state the basis for the Tribunal's decision in setting aside the determination. Respondent's application for reconsideration to the Tribunal was based on a myriad of grounds, all of which were dealt with by this office and which, for reasons stated below, we do not intend to canvas again.

[3] The Tribunal did not consider it necessary to consider all of respondent's grounds of application for reconsideration. The Tribunal considered the issue of factual and legal causation and decided to dispose of the matter on those grounds only. This is what the Tribunal stated:

"67. This aspect of the factual and legal causation considered herein above, in our view, disposes of the matter and it will be pointless to consider the other listed grounds of appeal".

[4] To put the matter plainly, the Tribunal found that the requirement of causation was not met and referred the matter back to this office. For purposes of this reconsideration, this office will consider the issue of causation as stated in the decision of the Tribunal.

Further Representations

[5] In the exercise of caution and in the interests of fairness, this office referred respondent, through his attorneys, to the decision of the Tribunal and invited further representations or submissions relating to the issue of causation.

[6] In response, respondent's attorneys filed further submissions which will be taken into account herein.

B. THE ISSUES

[7] It is not in dispute that respondent, as a financial services provider (FSP), advised complainant to make an investment in Sharemax Zambezi Retail Park Limited, a property syndication managed by Sharemax Investments (Pty) Ltd ("Sharemax"). The investment was in the sum of R650 000. Complainant received monthly interest payments from May 2008 to July 2010. It is not disputed that in August 2010, Sharemax defaulted on all interest payments and not long thereafter the whole scheme collapsed. Complainant's capital was lost and there is no prospect of recovering any part thereof. Sharemax was finally liquidated.

[8] Complainant complained, inter alia, that respondent's advice, in the circumstances, was inappropriate as the Sharemax product was not suitable for her; bearing in mind her financial circumstances and that she had no tolerance for risk. It was alleged that respondent breached the General Code of Conduct for Financial Services Providers (the Code of Conduct).

[9] The Tribunal made a finding that respondent had breached the Code, I refer to the following statement in the Tribunals decision:

"The record before us contains no summary (containing information obtained in terms of section B of the Code of Conduct) referred to in section 9(1) of the Code of Conduct. The fact that the Applicant handed a copy of prospectus to the First Respondent did not absolve him from complying with the FAIS Act and the Code of Conduct. The absence of a summary in terms of section 9(1) of the Code of

Conduct can only mean that there was no compliance with section 9(2) of the Code of Conduct. We have not seen anything which indicates that the attention of the First Respondent was drawn to the aspects which focuses on the risks of the Sharemax and Zambezi investments. <u>We therefore hold the view that the Applicant breached the implied terms of the mandate contained in section 7(1) and 9(1) and (2) of the Code of Conduct.”</u>

“the Applicant has breached section 8(1) (c) and section 9(1)(a) to (c) of the Code of Conduct. The Applicant did not, in our view, give advice with the appropriate degree of skill and care and therefore he acted negligently.”

“In conclusion, we find that the Applicant has not adequately explained the risks in the Sharemax I Zambezi Investment and made a frank and full disclosure of any information that would reasonably be expected to enable the First Respondent to make an informed decision. In short, <u>the Applicant has breached the implied terms of the mandate and therefore acted negligently”.</u>

See paragraphs 42, 46 and 62 of the Tribunal’s decision. (Emphasis added)

[10] The Tribunal found that negligent breach of the Code did not end the matter and went on to decide whether this office erred in finding that factual and legal causation existed.

[11] The Tribunal decided that legal causation had not been established and remitted the matter back to this office. Therefore, for purposes of this determination, I will confine myself to the issue of legal causation.

The Tribunals Material Findings

[12] Of relevance to this determination are the following findings made by the Tribunal:

a) In investing according to respondent's advice, the complainant was looking for a "safe investment". Complainant was concerned about safety and not the performance of the investment. The Tribunal quoted the following from her complaint: *"After a long time I agreed to invest the money at Sharemax as I trusted Mr Mostert's opinion as an "expert". I was very scared because it was my pension money, all I had and Mr Mostert knew it."*

b) The fact that an FSP had handed a copy of the prospectus, without more, to a client does not absolve an FSP from explaining the risks pertinent to an investment.

c) The Tribunal found no evidence that respondent drew complainant's attention to the risks in the Sharemax investment. The respondent was in breach of Sections 7(1), 9 (1) and 9 (2) of the Code of Conduct.

d) The Tribunal made a finding that respondent did not give advice with the appropriate degree of skill and care and therefore he acted negligently.

C. CAUSATION

[13] The Tribunal made the following comments regarding causation; which comments were intended to assist this office regarding the issue:

a) *The record in this matter does not show that the Ombud has countered or dispelled the above submission either by evidence, including expert evidence,*

where possible. Such a move may assist in throwing some light on the factual and legal causation aspect.

b) *In short, no factual causation or causal link has been established.*

c) *Lastly, even though the Applicant has, in our view, failed to comply with the provisions of the Code of Conduct, that is, he did not appropriately advise the First Respondent, and explain the potential risk to the First Respondent, any such breach was not causally connected to the First Respondent's loss.*

d) *We recommend that the Ombud to consider, where necessary like in this case, investigating the aspect of causation and where possible to procure expert evidence on property syndication of this nature, which may throw light in matters of this nature.*

The Approach of this Office

[14] The determination was set aside and referred back to this office for reconsideration. The approach in reconsideration is as follows:

a) This office accepts the Tribunals findings that respondent, in providing complainant with financial advice, acted negligently and was in breach of the Code.

b) This office will address the Tribunals findings on the issue of legal causation and will address the pertinent question posed by the Tribunal in its decision.

c) This office will take into consideration the further submissions made by the respondent’s attorneys;

d) This reconsideration will be guided by established case law, including SCA decisions. We note that the Tribunal only considered, and was bound, by the

decision in Symons N O v Rob Roy Investments CC 2019 (4) SA 112 (KZP) (the Symons decision). The learned Tribunal was unfortunately not referred to conflicting provincial and Supreme Court of Appeals' decisions. Thus, the Tribunal came to its decision on causation without the benefit of the most recent jurisprudence. The Symons case was, with respect, wrongly decided as it failed to consider the nature of the Sharemax scheme, its inherent risks and the fact that it was unsustainable from its inception, being a pyramid scheme. The Symons decision is not supported by the SCA in the judgements referred to below.

e) In particular this office will refer to two decisions: Oosthuizen v Castro and another 2018 (2) SA 529 (FB) (the Castro decision) which decision was approved in the SCA in Centriq Insurance Company Ltd v Oosthuizen and another 2019 (3) SA 387 (SCA) (the Centriq decision).

f) It was not necessary to engage an expert, as suggested by the Tribunal, as this office will show that the inherent nature of the Sharemax investment was such that a reasonably competent FSP in the position of respondent, would not have advised complainant to invest in Sharemax. This approach is supported by the Castro and Centriq decisions. The two judgements are not distinguishable from the facts of the present matter.

g) This office has consistently maintained that the Sharemax scheme was unsustainable as it was in essence a "Ponzi" or pyramid scheme. The SCA now agrees with this view. Contrary to what the respondent submits, with the support of an expert, the scheme did not collapse as a result of intervention by the South African Reserve Bank, it collapsed because it was unsustainable from its inception.

h) This office will show that respondent's undisputed negligent conduct, which breached the Code, was linked sufficiently closely or directly to the loss suffered by complainant.

i) The test to be applied is a flexible one in which factors such as a reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all play their part. See Standard Chartered v Nedperm Bank 1994 (4) SA 747 (A).

The Nature of the Scheme

[15] The Sharemax scheme, in respect of both the Zambezi and the Villa schemes, used a prospectus that was worded in identical terms. All the brokers who marketed the investment had access to the prospectus. In addition, the FSPs were also given access to the disclosure document and the application forms.

[16] It is not in dispute that respondent had access to these documents and one can accept, at least, that he read the prospectus and disclosure documents. A reasonably competent FSP, in the position of the respondent, can be expected to read and understand the prospectus before advising client to invest. In particular respondent was expected to understand the scheme and become familiar with the risks inherent in investing therein. The Code requires an FSP to obtain as much information about the product as is reasonably possible so that he can convey the information to client, to enable the client to make an informed decision. See: Sections 7 and 8 of the Code.

[17] The prospectus tells the FSP the following:

a) Although the scheme is described as "property syndication", Sharemax did not own any property and the shopping mall was still in the process of being developed. There were no rent paying tenants.

b) Investors were not purchasing shares in property, but were being issued with debentures.

c) That Sharemax had no trading history, neither did it have any independent means with which to pay broker commissions, investor returns and the funding of the development.

d) Upon receipt of an investment, 10% of the capital was deducted immediately to pay 6% commission to brokers and 4% for administrative fees. In paragraph 15 of the Sharemax application form, attached to the prospectus, there is an undertaking by Sharemax "eventually repay" the 10% to investors. In effect, Sharemax was borrowing, without investors permission, 10% of their funds, to be paid back, interest free at some undetermined time in future.

e) The investor funds were not going to be held in an attorney's trust account, pending transfer of the property, as required by Notice 459. Instead, the balance of the funds was to be lent to the developer, at an interest rate of 14%. There was absolutely no security for this loan. The developer was to pay 14% interest to Sharemax who was in turn to pay the investor 12 % interest on the capital.

f) In addition, 3% of the investors' funds were to be paid to an entity called Brandberg in respect of agent's commission. This means that when an investors funds were lent to the developer, Capicol, the capital amount was already reduced by 13%.

[18] 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, used 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 was to pay the promoter 14% interest on the loan amount;

c) An amount of 3% of investors' funds was to be 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 calculated **on 100%** of the investors investment;

e) Interest payments of 12% per annum to investors commenced immediately, notwithstanding that Sharemax admittedly did not have any independent means to pay interest to investors and had already used up 13% of the capital to pay commissions and admin costs.

[19] 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 as a reasonably competent FSP:

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 the 14% interest from an independent source, but 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 a reasonably skilled financial services provider that in effect, investors were being paid from their own funds, the hallmark of a Ponzi scheme.

[20] The point to be made is that Sharemax did not hide the fact that they had no funds of their own and were going to use investor funds to pay for commissions, costs and the development. Sharemax offered brokers 6% commission on the whole capital amount invested, which commission was paid within two weeks of receipt of the invested capital. The commission was also not subjected to any claw-back arrangement. In this case, respondent made R39 000 just for filling in a few forms.

[21] Brokers were thus given lucrative financial incentives to convince unsuspecting investors to invest in Sharemax. The latter, through their broker network, targeted the most vulnerable people. The target market comprised of pensioners, widows and elderly people. Not the type of people who had the capacity to read a complex prospectus and disclosure documents.

[22] If one actually read the Sharemax prospectus, one does not have to be an expert to see that investors' own funds were used to pay their monthly interest as well as all other expenses associated with this development. Sharemax had no access to any other funds to make the payments that it made. It also relied on continued new investments to keep the scheme going. A typical Ponzi scheme.

A reasonably competent FSP in the position of respondent would have worked this out. See Centriq and Castro judgements summarised below.

The Centriq Judgement

[23] This was an appeal from a decision of the Free State Provincial Division where the trial court found in favour of the plaintiff who sued her FSP defendant for the loss of her investment of R2 million in Sharemax. The trial court's judgement is in the Castro decision

which was approved on appeal in the Centriq appeal. The material findings of the SCA are as follows:

a) *The client claimed, in an action against the FSP that he had failed to act honestly and fairly in her interests in recommending the investment; that he had not given her objective financial advice appropriate to her needs; and that he had not exercised the degree of skill, care and diligence expected of an authorised financial services provider. The product recommended was Sharemax.*

b) In the trial court which handed down the Castro decision, expert evidence was led that the FSP did not act, in giving advice to invest in Sharemax, as a reasonable investment advisor would. The FSP did not challenge the expert's finding. *Paragraph [5] of the judgement.*

c) The court concluded, on expert evidence, that *the investment "was hopeless from the onset". Plaintiff sued Mr Castro because he had failed to give her adequate investment advice, suitable to her needs for a safe investment, and not because the investment had not performed in accordance with the advice she had obtained. Paragraph [7] of judgement.*

d) *The court found that plaintiff required a safe high-income investment. She also accepted, as appeared from the 'Advice and Intermediary Agreement', that even though Mr Castro, the FSP, could not guarantee her capital investment or returns in the short term, he would direct his best endeavours to making a safe investment for her. Paragraph [10] of judgement.*

e) *The FSP explained to plaintiff "somewhat thoughtlessly and misleadingly", 'property cannot disappear'. He did not tell her that she was not investing directly in fixed property. He created the false impression that she was investing in a developed property and not in an uncompleted development.*

f) The court found as follows*: "The scheme required investors to transfer their money to Sharemax's chosen company. The company or Sharemax would then pay their investors interest on this investment without the underlying investment — the property development — having earned anything — and where it was unlikely to do so for years, pending the purchase of the land and the construction of a shopping centre. Only upon the completion of the construction centre would rental income be realised. Yet the prospectus previously mentioned held out to investors a projected rate of return equal to 10% after tax as a dividend from the date of full subscription to the occupation date in September 2011. The 'investment' in fact had all the hallmarks of a Ponzi scheme in which money placed by later investors pays artificially high interest or dividends to the original investors, thereby attracting even larger investments. When there are no longer new investors, which inevitably happens, the scheme collapses. Mrs Oosthuizen was one of the later investors. On any objective analysis the investment was not viable, certainly not having regard to her needs." Paragraph [14] of judgement.*

g) The following finding of the trial court was met with approval in the SCA*: 'It is amazing that [Mr Castro] could think for one moment that interest could lawfully accrue from the investment from the first month. I wonder where he thought the magical origin of the income stream would derive from. (A) simple investigation or even an inspection of the half-built shopping complex would have been an eye-opener. He would have realised that enormous costs would have to be incurred to complete the project [and that the] half-built shopping complex could not earn any income for some time . . . but the investment provided for income to be paid to investors from the start.' Paragraph [15] of judgement.*

h) *It was, to be kind to Mr Castro, an investment that he himself did not properly understand. He dismissed the adverse criticism circulating in the media without*

satisfying himself as to whether there was any substance in it. He quite clearly failed to explain the risks of the investment so as to allow Mrs Oosthuizen to make an informed decision. Paragraph [16] of judgement.

i) *The finding by the court a quo that Mr Castro was in breach of his fiduciary duty to his client because he had not taken reasonable steps to satisfy himself of the safety of the investment and to give her adequate financial advice to meet her needs is therefore unassailable. As I have mentioned, Centriq does not contend otherwise. Paragraph [16] of judgement.*

j) *It is unnecessary, in my view, to engage in a semantic debate over whether the investment was worthless or hopeless from the beginning. Mrs Oosthuizen made clear in her further particulars that the investment was not a viable proposition. Mr Heystek confirmed this. It is also apparent that the only payment of R1400 Mrs Oosthuizen received from Sharemax on 3 August 2010 — a mere five days after she made the investment — was a sweetener to dupe her and other unsuspecting investors into believing in the efficacy of the investment, reminiscent of a Ponzi scheme. No proper financial rationale was given for how this amount was generated or that it represented some intrinsic or residual value. If we test this by attempting to place a market value on the investment at its inception — determined by reasonably informed buyers and sellers — there is no question that it would have yielded a negative result. Paragraph [25] of judgement.*

k) *Mr Heystek's evidence strongly suggests that no reasonably informed buyer would have touched this scheme with the proverbial barge pole. Paragraph [25] of judgement.*

l) *Centriq's reliance on the second leg of the exclusion would appear, at first blush, to rest on a stronger foundation. The argument is this: The court a quo's factual finding was that Mr Castro had induced Mrs Oosthuizen to make this unsafe*

investment. But for his representations as to its performance — ie that it was safe and thus would not decline in value — she would not have made the investment. The exclusion, so it is contended, was therefore triggered. The court a quo dismissed this contention. It held that Mrs Oosthuizen did not rely on representations (advice) regarding the performance of the investment<u>, but as to the safety of it</u>. Paragraph [29] of judgement.

m) *It is quite clear that Mrs Oosthuizen was less concerned with how well the investment would perform but rather with whether it was safe. Most investors accept that there may be loss if an investment does not perform according to expectation. She was not such an investor. Her primary concern was that the investment was safe, that she would not lose anything, and that it would yield a consistent return to meet her needs. This was not the bargain she got. Mr Castro did not mislead her regarding the anticipated performance of the investment <u>but regarding its fundamental character</u>. Paragraph [30] of judgement.* (emphasis added).

[24] In Para 57 of the Castro decision; the court found as follows:

a) *I agree with Mr Heystek's testimony that all initial payments — at least until income is eventually received from tenants — would have to be paid out of funds put in by investors themselves. Investors therefore paid their or other investors' interest. There were no other sources of income during the construction phase of The Villa. The underlying property — the half-built shopping complex — could not produce income on a monthly basis as investors and plaintiff in particular expected. Defendant was in breach of his fiduciary duty towards plaintiff in that he did not take reasonable steps to satisfy himself of the safety of the Sharemax investment. I am also in agreement with Mr Heystek, accepting the ruling in 2013 of the Ombud*

for Financial Services, Ms Bam, that The Villa bore 'uncanny characteristics to a so-called Ponzi Scheme'. (Emphasis added)

b) *Defendant offered wrong and unsuitable advice to plaintiff, either through incompetence and/or disingenuousness and/or negligence, or for the lure of a small fortune. It is common cause that he earned a commission of R120 000 for an afternoon's effort. This is an enormous amount of money and not market-related. It is a well-known phenomenon that promotors in these types of schemes make use of high commissions to attract brokers and so-called financial advisors to do business. In the process, pensioners, widows and other vulnerable people's savings and inheritances are being collected, often to be lost when the house of cards collapses. Defendant should have known that a return on an investment in The Villa was pie in the sky. His inexplicable, but obviously poor, advice is indicative of lack of skill, care and diligence and was not commensurate with the commission received. The parallels between the facts in casu and those in Durr are remarkable. Defendant failed to make enquiries himself, as did the broker in Durr, but notwithstanding this he assured plaintiff that the investment was 'entirely safe', as did the broker in Durr. Para 58 of judgement.*

c) Much more may be said of defendant's actions and/or inactions, but I conclude by finding that defendant was negligent, and even dishonest, when he advised plaintiff, by placing no credence on the negative articles in the press, and failing to objectively investigate the criticism. He failed to exercise the degree of skill, care and diligence which one is entitled to expect from a FSP. The facts in casu are very similar to those in Durr supra and the result should be the same. Paragraph [60] of judgement.

Both the above decisions approved and applied Durr v ABSA Bank 1997 (3) SA 448 (SCA).

[25] This office has drawn attention to the above judgements as:

a) They cannot be distinguished on the facts; and

b) The findings of fact and law apply directly to this complaint.

Application of the Case Law

[26] Considering the record of the facts before this office, the following findings can be made, on an undisputed basis:

a) Complainant received funds from a Momentum policy that matured and needed to invest it. She was looking for an investment with good returns but most of all she wanted a safe investment. The funds represented all she had and she had absolutely no means of replacing it in the event of loss.

b) She relied on respondent "as an expert" to place her funds in *a safe investment.* Respondent advised her that an investment in Sharemax was safe.

c) The Tribunal found that he had offended the Code and acted negligently when he advised complainant to invest in Sharemax.

d) A reasonably competent FSP, in the position of respondent, would be expected to read and understand the prospectus and disclosure documents before advising client to invest.

e) A reasonably competent FSP in the position of respondent, would make themselves familiar with the investment model and in particular its viability and sustainability.

f) A reasonably competent FSP in the position of respondent is expected to satisfy himself as to how and from what funds the promoter was going to pay his extravagant commission and above market interest or returns on the investment.

g) In the event of lack of capacity, a reasonably competent FSP in the position of respondent would seek assistance and advice to help him understand the prospectus and the scheme set out therein.

h) A reasonably competent FSP would have realised that the Sharemax scheme was unsustainable and a Ponzi or pyramid scheme and would not have advised any client to invest in it.

i) The respondent ought to have realised that the Sharemax investment operated on the basis that all payments relating to commissions, admin costs and development costs were being paid out of investor funds. This much is actually disclosed in the prospectus. Both the prospectus and the disclosure documents warn that this was a high-risk investment where neither the capital nor income is guaranteed. But most importantly, the prospectus on a proper reading actually discloses that investor funds were to be used to fund the whole scheme and that returns were also going to be paid from investors funds. It was, to quote the SCA, a Ponzi scheme. No competent FSP would ever advise a client to invest in a pyramid scheme of any kind. Certainly not an investor with the complainant's profile whose livelihood was entirely dependent on the funds she placed in respondent's hands with the hope that respondent's assurance of safety would be fulfilled.

j) The cause of Sharemax's collapse was not the result of the SARB intervention. It was inevitable that Sharemax was going to collapse as soon as new investors dried up. However, when the media covered the SARB intervention, combined with all the existing negative media it accelerated a trickle down of new investments. With no new investments to fund the scheme to continue monthly interest payments, the

whole scheme inevitably collapsed. It is what happens to any Ponzi scheme when new investments stop. If the Sharemax scheme was anything other than a pyramid scheme, its sudden and catastrophic collapse would not have happened.

Foreseeability

[27] The respondent's defence is based principally on the foreseeability and cause of the Sharemax collapse. However, this is premised on a misdirection that the collapse was caused by the intervention of the SARB. Besides, there was no evidence, other than the opinion of Cohen, that the SARB actually caused the Sharemax scheme to crash. The scheme failed because it relied on new investments to sustain itself. When new investments dwindled, the scheme suffered the kind of catastrophic collapse typical of pyramid schemes. Sharemax collapsed, not because of the SARB, but because it was unsustainable from the outset – See the Castro and Centriq decisions. A reasonably competent FSP in the position of the respondent would have realised that Sharemax was a pyramid scheme, as described in the prospectus and would not have advised his client to invest. The scheme would have collapsed without any intervention from the SARB. The fact remains that when Sharemax went into liquidation, it did not have assets and other resources to pay the developer and interest to investors. The amount owed to investors far exceeded the value of Sharemax's assets. This is also a characteristic of pyramid schemes.

[28] I have seriously considered what Respondent states regarding his "opinions". Cohen is not persuasive as he does not specifically deal with the Sharemax scheme; nor does he state that the idea of using investor funds to pay their own interest and to fund a nonexistent development is acceptable within the investment industry. Cohen merely deals with other hypothetical examples irrelevant to the issues here.

[29] Had respondent acted according to the standards of the Code, he would have found out that the Sharemax investment was unsustainable and that its business model constituted a pyramid scheme. The Code sets out the benchmark and minimum standards with which financial advisors are expected to adhere to. In so far as respondent's advice that he rendered to the complainant is concerned, it is evident from the findings of the Tribunal herein that the Ombud properly assessed it on the basis of the provisions of the Code. The Tribunal justifiably made a finding that respondent was negligent.

[30] The respondent, had he complied with the Code, would have foreseen that Sharemax was unsustainable and its collapse was inevitable. See Castro and Centriq, above.

[31] It is trite that an FSP is not required to foresee exactly how the collapse happened, nor is an FSP expected to foresee the actual reason for the collapse. In delict the reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring be reasonably foreseeable for liability to result: it is sufficient if the general nature of the harm suffered by the plaintiff and the general manner of the harm occurring was reasonably foreseeable.
STANDARD CHARTERED BANK OF CANADA v NEDPERM BANK LTD 1994 (4) SA 747 (A) At 768F/G-G/H.

[32] It is in the general nature of pyramid schemes that they will collapse once the investor base shrinks as it inevitably does. This was confirmed by the SCA in the Centriq decision. A reasonably qualified or prudent FSP in the position of the respondent could easily foresee that the Sharemax model was unsustainable and was bound to collapse and lose his clients' funds. If respondent did not have the capacity to understand the prospectus,

then he was negligent in not consulting an expert or anyone else with the capacity to assist him; See Durr v Absa Bank.

The need for an expert

[33] At the outset, we point out that one does not have to be an expert to know that Sharemax was a pyramid scheme. A reading of the prospectus tells one that this is a Ponzi scheme. The directors behind Sharemax knew and exploited two things: firstly, their target market of elderly people were not even going to read the prospectus; and secondly if they offered a lucrative commission, brokers could easily be induced into selling the product.

[34] The SCA, in the Centriq decision, has found that Sharemax was a Ponzi scheme. There is thus no need to seek the opinion of an expert. The Tribunal is bound by a judgement of the SCA. More so when the facts of the case render the judgement indistinguishable. It is highly unlikely that the learned Tribunal would have recommended an expert if its attention had been drawn to the Castro and Centriq decisions.

Respondent's further submissions

[35] In the interests of fairness, this office offered the respondent a further opportunity to make submissions, in particular with reference to the learned Tribunals findings. The respondent filed a lengthy response in which he spent much effort in criticising this office for requesting a further response. Notwithstanding the fact that respondent had made full representations already, he proceeded to justify his submission that the SARB was responsible for the collapse. He also described this office's findings regarding the nature of the Sharemax scheme as "lay speculation".

[36] A prominent feature of the respondent's further submissions is his careful and deliberate avoidance of the Castro and Centriq decisions. He refers to other judgements but avoids these two judgements, one being an SCA decision. The only conclusion to be drawn from such omission is: firstly, that he could not distinguish the SCA judgement on the facts of this case; and secondly, he was unable to avoid the fact that it is binding authority. But this office also expected respondent to explain why he failed to draw the Tribunal's attention to these decisions when his application for reconsideration was argued.

D. FINDINGS

[37] For reasons stated above, I make the following findings in relation to the issue of causation, referred to by the Tribunal:

a) The learned Tribunal has already found that respondent was negligent and offended the Code when he gave complainant advice to invest in Sharemax;

b) It is not in dispute that the complainant wanted a "safe" investment for her funds. It is equally undisputed that respondent sold Sharemax to her as being a safe investment well knowing that it was a high-risk investment (as appears in warnings in the prospectus and disclosure document);

c) Respondent knew or ought reasonably to have known that the Sharemax scheme was a pyramid scheme as investors were being paid their monthly returns from their own funds (as stated in the prospectus);

d) The learned Tribunal confirmed that factual causation was proved;

e) For reasons stated above I find that respondent's advice to invest in a pyramid scheme was sufficiently causally connected to complainant's loss. Accordingly, legal causation was established; and

f) Since the final liquidation of Sharemax, there is no prospect that complainant will recover any part of her lost capital.

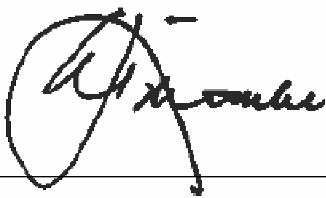
g) Respondent is liable to pay complainant the sum total of her capital and interest.

E. THE ORDER

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

1. The complaint is upheld;
2. Respondent is ordered to pay Complainant an amount of R650 000;
3. Interest on this amount at the rate of 7% from a date 14 days from date hereof to date of payment.
4. Any party aggrieved by this decision is entitled to apply for its reconsideration by the Financial Services Tribunal in terms of section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 6th DAY OF SEPTEMBER 2021



ADV NONKU TSHOMBE
OMBUD FOR FINANCIAL SERVICES PROVIDERS