THE OFFICE OF THE FINANCIAL OMBUD FOR FINANCIAL SERVICES PROVIDERS PRETORIA

CASE NUMBER: FAIS 05615/11-12/ KZN1

In the matter between:

RODNEY GWYNNE MORGAN	**Complainant**
and	
BAHATI YETU BROKERS CC	**First Respondent**
ALIDA MARIA du PREEZ-MARITZ	**Second 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] Complainant, on advice of respondent, his financial advisor of many years, invested in Sharemax. Upon becoming aware that Sharemax was bankrupt, complainant terminated his business relation with respondent and appointed another financial advisor to manage his financial affairs.

[2] Complainant claims that were it not for respondent's failure to properly advise him on the investment, he would never have made the investment. He claims that respondent must be held accountable for his lost investment and ordered to repay him. For reasons that follow, I am satisfied that respondents have failed to comply

with the Sections 2, and 8 (1) (a), (b) and (c) of Part VII of the General Code of Conduct, (the Code).

B. THE PARTIES

[3] Complainant is Rodney Gwyne Morgan, an adult male farm manager, residing at SASA Experiment Farm, Pongola, Kwa-Zulu Natal province.

[4] First respondent is Bahati Yetu Brokers CC, a close corporation duly registered in terms of the laws of South Africa, with its principal place of business at 19 Illovo Road Beach, Durban. Information from the regulator indicates that respondents were not licensed to render financial services at the time.

[5] Second respondent is Alida Maria du Preez – Maritz, an adult female, sole member and authorised representative of the first respondent. At all times material hereto, complainant dealt with second respondent, while the latter represented first respondent.

[6] I refer to first and second respondents, simply as respondent. Where appropriate I specify.

C. FACTUAL BACKGROUND

[7] On or about 18 June 2009, on the advice of first respondent, complainant invested an amount of R 40 000.00 into a Sharemax (property syndication scheme known as Sharemax, The Villa Retail Park Holdings Limited **("The Villa").**

[8] First respondent had been complainant's financial advisor prior to this investment. As a matter of fact, the first respondent advised complainant to disinvest his R

40 000.00 investment from Old Mutual Investment Horizons and invest it in Sharemax. The rationale for this, according to first respondent's advice, was that complainant would receive better returns from the Villa investment.

[9] Complainant did not see anything untoward about first respondent's advice at that time; he was receiving regular interest from an investment of R 100 000.00 he had made into the Liberty Mall Welkom, also a property syndication promoted by Sharemax. The investment was also made on advice of first respondent.

[10] On 18 June 2009, complainant signed an *Application Form for Linked Units*, in which he applied for allocation of units in The Villa. Attached to the application form was Sharemax *Investment risk Assessment On Product Information* which was signed by both the complainant and first respondent. I deal with this later in this determination.

[11] On the instruction of first respondent, on the same day of 18 June 2009, complainant deposited a cheque in the amount of R 40 000.00 into the trust account of Weavind and Weavind Inc, the designated attorneys for this Sharemax syndication. As a result, on 18 August 2009, complainant received a share certificate reflecting ownership of 40 unsecured shares of R 999.99 per share.

[12] Complainant received interest on the investment from 1 August 2009 until 1 September 2010. It was at this stage that complainant discovered that The Villa had become bankrupt. This was followed by an avalanche of media articles reporting on the illegality of the Sharemax property syndication scheme.

[13] Confronted with this gloomy reality, complainant, on the request of his relative, terminated first respondent's services and appointed another financial advisor to manage his financial matters.

D. THE COMPLAINT

[14] From the foregoing factual background, the crux of the complainant's complaint as captured in the *Complaint Registration Form*, in part, reads:

> *"…so I assumed that that The Villa would do the same so I agreed. I did not know at the time and she did not tell me that this was a* ***high risk investment*** *as the building had not been completed and paid in from investors would pay for the cost of the building…" (own emphasis)*

E. RELIEF SOUGHT

[15] Complainant seeks payment of the amount he invested on the advice of respondents in the amount of R 40 000.00.

F. FIRST RESPONDENT'S VERSION

[16] In compliance with Rule 5 (b) of the Rules of Proceedings of the Office of the Ombud ("Rules"), on or about November 2011, complainant wrote a letter to first respondent in which he sought to resolve the complaint with first respondent.

[17] This was followed by the FAIS Ombud's emails dated 05 December 2011 to respondents in which the FAIS Ombud advised respondents to address the complainant's allegations that he was not properly advised and that the financial product recommended was not suitable for his financial situation.

[18] The email also brought to the attention of respondents, the provisions of Rule 6 (b) of the Rules. Further that if the complaint remains unresolved by 17 January 2012, the provisions of Section 27(4) (a) of the FAIS Act would be invoked.

[19] On the same day of 05 December 2011, first respondent replied to the FAIS Ombud's email. In the email, the first respondent requested an extension of time to 17 February 2012. The reason was that she was *"involved with the proxy and salvaging of the The Villa…"*

[20] In response to first respondent's email, the FAIS Ombud addressed an email dated 20 January 2012. In the email, the FAIS Ombud attached an email from complainant informing first respondent that she had to resolve the complaint within the time afforded by Rule 5 of the Rules; that first respondent's request for extension of time was not justifiable and cannot be considered. Respondent was invited to submit her response to the complaint by no later than 30 January 2012, failing which the FAIS Ombud would proceed with the matter.

[21] On the same day of 20 January 2012, respondent addressed an email to the FAIS Ombud in which she uttered words, so objectionable about complainant, that they cannot be repeated in this determination. Below I capture in part what the First respondent said:

"…My request were justifiable, I just never had an answer back from you. Firstly my office closed and only reopened on the 10th of January.

Secondly, I think this particular client is a bit way off the mark. He were (was) involved with a previous building, that were he made a handsome profit and He opted to reinvest in the next building…

*I will not be able to have this **rubbish** ready before the end of the month. I treat this with the **contempt** it deserve.*

*I have not time for **stupidity** like this…Now I have to **waste** time to sit and exonerate myself…" (own emphasis)*

[22] On 18 October 2012, the FAIS Ombud addressed an email to respondent in terms of Section 27(4) of the FAIS Act informing her that the complaint has not been resolved and that the office was proceeding towards an investigation. The email clearly informed respondent of the complaint as follows:

(i) The alleged non-disclosure of material aspects of the investment including the risk; and

(ii) The alleged failure to properly advise complainant.

[23] Following the ruling of the Appeals Board on 10 April 2015 in the matter of **Siegrist and Bekker** appeals, this office, sent a notice in terms of section 27 (4) to the respondent.

[24] The notice informed respondent that:

i) she is viewed as a respondent in this matter.

ii) the office will upon receipt of her response formally commence its investigation procedures.

iii) The Office will after investigating the matter make a determination, based on the information it its possession, without further referral to respondent.

[25] Further, the following facts and related questions, were posed to respondent for her consideration and response:

25.1 "*Property syndications are high risk investments for a number of reasons let alone the fact that they are structured as unlisted companies and the basis upon which the properties are valued are never fully disclosed.*

25.2 Being unlisted means that such an investment should be considered as a capital risk investment. Investors such as the Complainant are at risk as unlisted shares and debentures are not readily marketable, the value is also not readily ascertainable, and should the company fail, which ultimately occurred, this may result in the loss of the investor's entire investment.

25.3 Was your client properly apprised of these risks? Please provide evidence to this effect. Only information provided to your client at the time of advice will be acceptable. In other words, we are looking for a record of advice, which must have been provided to your client at the time of rendering the service. NB: A post facto account of what was said, will not be acceptable.

25.4 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.)

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

25.6 We also need a record that shows that you elicited personal information from your client, including his financial circumstances, to demonstrate that you understood his circumstances prior to advising them. (Be advised that this record must have existed then. No post facto account will be accepted.)

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

25.8 We await your response by no later than close of business on 7 July 2015".

[26] Despite all the efforts by the FAIS Ombud to obtain a response from respondents, respondents have failed to furnish their response.

G. DETERMINATION

[27] The issues for determination are:

i) whether respondent, in rendering financial services to complainant, violated the Code and the FAIS Act in any way. In specific terms, the question is whether complainant was appropriately advised, as the Code demands?

ii) In the event it is found that respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of;

iii) Quantum

Whether complainant was appropriately advised by respondent?

[28] On the whole, complainant's complaint is that respondent inappropriately advised him to invest in Sharemax the Villa, without disclosing the high risk nature of the investment and without conducting due diligence on the entities involved. As a result of respondent's advice, complainant made the investment. Following complainant's discovery of the bankruptcy of the Villa, complainant is of the view that he has lost his investment.

[29] Respondent shied away from responding to the hard questions relating to her assessment of the risk involved in Sharemax and how the risk matched complainant's circumstances. She further chose to remain silent in the face of the statements regarding viability of the investment.

H. LEGISLATIVE FRAMEWORK

[30] It is appropriate at this stage to sketch out the applicable provisions of the FAIS Act and General Code of Conduct, (the Code) which are relevant in the present matter.

[31] Section 16 of the FAIS Act provides:

'(*1) A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of such code to-*

(a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;

(b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;

(c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;

(2) A code of conduct must in particular contain provisions relating to-

(a) the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;

(b) adequate and appropriate record-keeping;

I. GENERAL CODE OF CONDUCT

[32] Section 2, of Part II of the General Code provides:

"*[2] A provider must at all times render financial services honestly, fairly with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry."*

[33] Section 8 (1) of the General Code of Conduct provides that a provider must, prior to providing a client with advice:

"(a). Take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product

experience and objectives to enable the provider to provide the client with appropriate advice;

(b) Conduct an analysis, for purpose of the advice, based on information obtained;

(c) Identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement; and…."

J. ABSENCE OF RESPONDENT'S VERSION

[34] It is abundantly clear that this office did everything in its power, to obtain respondents' version. In that regard, respondents were afforded ample opportunity to give their response to the complaint. However, as amply demonstrated in their responses, quoted above, respondents made it clear that the complaint was not worth their while, and simply dismissed it as "rubbish" and a "waste of time".

[35] Against the complaint, respondent wrote only two emails. In the first email dated 05 December 2011, she requested an extension time until 17 February 2012 to consider the complaint. In the second email dated 20 January 2012, she hurled what I can only call unpalatable statements and gratuitous attack against complainant.

[36] As for the Sharemax tool used to assess complainant's risk profile, there is simply no basis upon which one could take this seriously. Firstly, there is no relevant information relating to complainant's circumstances whatsoever. How respondent was able to appreciate complainant's capacity for risk escapes me. The risk profile

assessment form does not comply with Section 8 (1) (c) of the Code. It is simply not worth the paper it is written on.

[37] Respondent's advice involved the replacement of an Old Mutual investment by the Villa investment. There is no record to show that the provisions of section 8 (1) (d) (i)-(viii) were being complied with by respondents.

[38] For the record, respondent was asked to produce any record of advice reflecting the nature and process he followed in advising complainant. Respondent failed to produce same. It is therefore not known what informed respondent that the Sharemax investment was suitable to complainant's circumstances. See in this regard section 8 (1) (a) to (c) of the Code.

[39] Respondent has further not bothered to provide reasons for failing to respond to the complaint.

[40] Given the circumstances of this case, I am unable to disregard the version of the complainant. In this regard the matter of **DA MATA v OTTO, N.O**[1] is instructive.

[41] Van Blerk JA, dealing with the approach to be adopted when deciding probabilities, said:

'*In regard to the appellant's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted ─ the only witness who could have disputed them had died ─ they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p. 260, states that the mere assertion of any witness does not of itself need to be believed, even though he is*

[1] 1972 (3) 858 (A), at 869 B-E

unimpeached in any manner, because to require such belief would be to give a quantative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:

"It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts ─ testimony which no sensible man can believe ─ goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded."'

[42] The respondent's conduct contravened Section 8 (1) as no proof has been furnished to this office that the provider had carried out his duties as stated therein, prior to advising complainant on this product.

Did respondent's conduct cause the loss complained of*?*

[43] Based on complainant's version, the investment in Sharemax the Villa was made as a result of respondent's advice. Thus, absent respondent's advice, there would be no investment in Sharemax the Villa.

[44] Outside of the complainant's version, there is no evidence pointing to respondent's adherence to the law. The information at this office's disposal points to the following conclusions:

(i) Had respondent followed the Code, he would not have recommended an investment in the Villa;

(ii) When respondent recommended the investment in Sharemax, he could not have been acting in complainant's interest. For one, there is no evidence suggesting that respondent knew what paid the investors' interest, given that the properties were being constructed;

(iii) There is no evidence that respondent had conducted due diligence on the Sharemax investment. This means, respondent had no idea what he was inviting complainant to, when he recommended the Sharemax investment.

(iv) There is no evidence that respondent was aware of the risk involved in Sharemax. These include the lack of apparent safeguards to protect investors against director misconduct; the lack of visible governance arrangements; and the complicated structure of the investment itself, which left the investors with no protection.

[45] Respondent's conduct caused complainant's loss.

K. FINDINGS

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

46.1. I accept the uncontroverted version of the complainant.

46.2. Respondent advised the complainant to invest R 40 000 in Sharemax the Villa without first assessing the financial needs, conducting an analysis and determining the risk profile of complainant, thereby contravening Section 8 (1) (a), (b) and (c) of Part VII of the General Code of Conduct.

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

46.4. Respondent failed to maintain records of advice as required by section 9 of the Code.

L. QUANTUM

[47] Complainant invested an amount of R 40 000.00 in The Villa. There are no prospects of ever recovering the money from Sharemax.

[48] Accordingly, an order will be made that respondents pay to the complainant an amount of R 40 000.00 plus interest.

M. THE ORDER

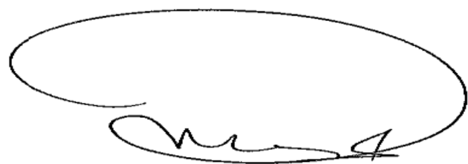
[49] In the premises, I make the following order:

1. The complaint is upheld.

2. The Respondents are ordered to pay the complainant, jointly and severally, the one paying the other to absolved the amount of R 40 000.00;

3. Interest on the amount of R 40 000.00 at the rate of 10.25 % per annum a date seven (7) days from date of this order to date of payment.

DATED AT PRETORIA ON THIS THE 11th DAY OF MAY 2016.



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