

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

CASE NUMBER: FAIS 02042/13-14/ GP1

FAIS 06317/11-12/ GP1

In the matter between:

WILLEM CHRISTIAAN STEYN OOSTHUYSEN

Complainant

and

ERNEST LEHANIE

Respondent

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

A. INTRODUCTION

[1] During January 2012, complainant filed two complaints with this Office against respondent. The complaints arose from investments made by complainant in Sharemax, The Villa¹. The basis of the complaints are that respondent advised complainant to invest in high risk schemes that were incompatible with his personal circumstances as a pensioner.

[2] For purposes of this determination, the complaints will be dealt with as one.

¹ Retail Park Holdings Limited 9 and Retail Park Holdings 2 Limited

B. THE PARTIES

[3] Complainant is Willem Christiaan Steyn Oosthuysen, an adult male pensioner whose full particulars are on file with the Office.

[4] Respondent is Ernest Lehanie, previously known as Ernest Venter, an adult male and representative of Ernest Venter Makelaars, an authorised financial services provider in terms of the FAIS Act with license number 15127, which has since lapsed. The regulator has confirmed that around 2013, Ernest Venter changed his last name to Lehanie.

[5] Respondent's records further indicate that respondent is in business, trading as Crowther LeHanie Finansiële Dienste, a Close Corporation duly incorporated in terms of South African Law, registration number 2001/082866/23, with its principal place of business at 24C Hertzog Street, Henneman, Free State. Crowther LeHanie is an authorised financial services provider in terms of the FAIS Act with license number 45033, which is still active. Respondent is noted as a representative of this entity as per the regulator's records.

[6] At all material times, respondent rendered financial services to complainant.

C. COMPLAINT

[7] Complainant's version of events are as follows:

7.1 During July 2009, complainant invested an amount of R200 000 in Sharemax, The Villa public property syndication, (The Villa). A year later (July 2010) complainant invested a further amount of R300 000 into the The Villa syndication. Complainant claims he specifically sought respondent's assistance, based on their relationship. Prior to the two

investments, which are the subject of this complaint, complainant had made seven (7) investments into various Sharemax property syndications, over a period of five (5) years, with the assistance of respondent.

- 7.2 When complainant was advised to invest in the Villa, he accepted respondent's recommendation. Complainant says he was assured by respondent that this was an excellent investment opportunity and that the investments were to pay above average returns.
- 7.3 Concerned about the safety of his investment, since he was utilising his pension to make the investment, complainant states he repeatedly asked respondent, and was assured that there was nothing to be concerned about, since the building (The Villa) was to be taken over in a couple of months. Complainant indicated that he never saw the building, nor did he receive a prospectus about the two investments.
- 7.4 The interest payable on the amounts invested had been determined at 12.5% and 10% per annum, respectively and payable monthly. Complainant says he received agreed interest amounts until July 2010. When no payment followed in August 2010, complainant sensed there was a problem and duly contacted respondent. The latter told complainant that Sharemax was experiencing an administration problem, which should be resolved shortly. Soon thereafter, Sharemax's predicament was published in the media.

[8] Prior to complainant's retirement, he was a self-employed electrician. Apart from the fixed property he owns, he had a farm which he sold during 2009. The two investments came from the proceeds of the sale of the farm.

[9] Complainant's monthly income is derived from annuities and investments², however, complainant claims he has been struggling to make ends meet since losing the investment income from The Villa.

D. RELIEF SOUGHT

[10] Complainant seeks repayment of the amount of R500 000 from respondent.

[11] The basis of complainant's claim against respondent is the latter's failure to render financial services in line with the FAIS Act and the General Code of Conduct, which includes respondent's failure to appropriately advise complainant and disclose the risk involved in the Villa investments.

E. RESPONSE

[12] In compliance with Rule 6(b) of the Rules on Proceedings of the Office of the Ombud, the Office referred the complaints to respondent, advising respondent to resolve the complaint with his client.

[13] Respondent duly responded during April 2012, however respondent only dealt with the 2010 investment in his response. As far as the 2009 investment is concerned, respondent only provided a "declaration by client" document which indicates what services were rendered. The essence of respondent's response appears in the paragraphs noted below:

² This was in 2012, when complainant filed the complaint.

- 13.1 Complainant initially approached Sharemax directly to make the 2010 investment, because of the mistaken belief that the commission payable to respondent would come from his capital investment. [*The suggestion here is that complainant paid no commission for the 2010 investment.*]
- 13.2 Complainant completed the application form for shares at the offices of Sharemax, and only consulted with respondent two days after it was signed. This was because complainant required respondent's signature on the documentation.
- 13.3 Respondent confirms that he indeed indicated to complainant that it was a good investment. According to respondent, complainant was so satisfied with his previous investments that he, on his own accord, opted to make the ninth (9) investment with Sharemax.
- 13.4 There is a suggestion that a Mr Coetzee of Sharemax, made a full presentation to complainant about the Sharemax investment at complainant's home. Furthermore, complainant accompanied respondent to Bloemfontein to attend a Sharemax presentation. Respondent suggests that complainant had first-hand knowledge of the product and was by all accounts very happy with the investment and indicated as much during their trip to Bloemfontein.
- 13.5 Respondent further suggests that a full risk analysis had been conducted by Mr Coetzee and complainant was presented with the prospectus. All the necessary paper work had been signed and complainant was alerted

to the fact that the shares were unlisted and the investment was medium to long term.

13.6 In conclusion, respondent considers complainant to be greedy. He noted in his response that “*om 75 jaar oud te wees, gee jou nie die reg om te lieg soos ‘n tande-trekker nie*”, loosely translated to mean ‘*the fact that you are old, does not give you the right to lie*’. He denies that complainant had been misled because he had already earned good profit from previous Sharemax investments. Respondent denies that he had been aware of problems at Sharemax, stating, that had it been the case, he would have withdrawn his own investments.

[14] Respondent’s reply was provided to complainant. Of relevance, are the following points that were raised by complainant:

14.1 Complainant is of the view that had respondent properly read and understood what was noted in the prospectus, he (respondent) would have noticed that the investment was high risk.

14.2 The date of completion of the Sharemax forms is in complainant’s view irrelevant, since he never received copies of signed documents or any other documents from respondent.

14.3 Details about commission were never discussed. Complainant states that he had made investments before and therefore knew that every broker earns commission for work done. Complainant nonetheless confirmed that respondent informed him that the commission would not come from his capital.

14.4 Complainant provides a contradictory version of the consultation in question. He claims it was respondent who directed him to Mr Coetzee for assistance.

14.5 Complainant insists he was never informed of the risk involved in the Sharemax investments, nor was he advised that the shares were not listed.

14.6 Lastly, complainant denies ever receiving a prospectus from respondent, or that the content of a prospectus had been explained to him. This despite the fact that complainant signed a document dated 15 July 2010, acknowledging that he received a prospectus.

F. DETERMINATION

[15] The following issue arises for determination:

15.1 whether respondent rendered financial services to complainant in respect of the investments.

[16] Complainant's version to this Office is that he was advised by respondent to make the two investments in Sharemax The Villa. He is aggrieved with the latter's conduct because the investments were high risk and not compatible with his circumstances.

[17] That respondent had a role to play in the coming into effect of the two agreements and duly received his commission is not disputed. Some documentation to this effect was provided to this Office.

- [18] Having said that, the case presented to this Office is a hodgepodge of contradictory statements. There is a material dispute of fact as to whether complainant was in fact persuaded by respondent to continue investing in Sharemax.
- [19] Complainant's version made no reference to his visit to Sharemax's office to make the investment of 2010, nor does it include his interactions with Mr Coetzee.
- [20] It was only after the complaint had been referred to respondent that the details about complainant's interactions with Coetzee (who was allegedly a consultant employed by Sharemax) came to light. After this information was revealed, complainant was afforded opportunity to comment on respondent's version and deal with the allegation that he acted on his own with regard to the 2010 investment.
- [21] Complainant was of no assistance in so far as resolving the question whether respondent rendered financial services to complainant regarding the 2010 investment.
- [22] Of particular significance is the fact that complainant chose not to deal with respondent's allegations pointing to his visit to Sharemax' offices to make the 2010 investment, only to be referred to respondent for the latter's signature on the forms. Instead, complainant was only prepared to state that the date on which the application forms were signed is of no relevance. This left the Office at a disadvantage as complainant did not deny respondent's statements. Complainant chose to point to respondent's failure to read the prospectus,

arguing that had respondent read the prospectus, he would have realised that the investment was high risk.

[23] If respondent's statements about the 2010 investment were correct, it would mean that respondent played no role in advising complainant about the 2010 investment. He came after complainant had taken the decision to invest.

[24] The matter does not end there. Parties making use of the Office to resolve disputes are expected to assist the Office by providing facts at their disposal, regardless of whether a particular aspect may not be favouring their version. That complainant chose not to deal with respondent's allegations means the Office cannot be of any further assistance in the matter.

[25] This leads me to conclude that the question whether respondent rendered financial services to complainant would be best suited to oral evidence and cross examination in order to arrive at the truth.

G. FINDINGS

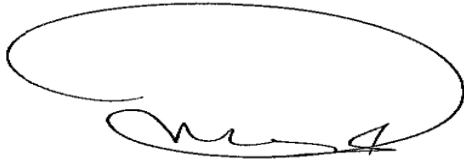
[26] In the premises, I find that it would be more appropriate that the complaint be dealt with by a Court, as provided for in Section 27 (3) (c) of the FAIS Act.

H. THE ORDER

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

1. The complaint is dismissed.

DATED AT PRETORIA THIS THE 30th DAY OF NOVEMBER 2016.

A handwritten signature in black ink, enclosed within a hand-drawn oval. The signature is cursive and appears to be 'M. N. Bam'.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS