IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 06467/10-11/GP 1

In the matter between:-

GILLIAN MABEL ORPEN	**Complainant**
and	
D RISK INSURANCE CONSULTANTS CC	**1st Respondent**
DEEB RAYMOND RISK	**2nd Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')

A. THE PARTIES

[1] Complainant is Gillian Mabel Orpen, a female retiree of Parkhurst, Johannesburg, Gauteng Province.

[2] First Respondent is D Risk Insurance Consultants CC, a close corporation duly incorporated in terms of South African law, with its principal place of business at 60 Van Riebeeck Avenue Edenvale, Gauteng Province. First respondent is an authorised financial services provider in terms of the FAIS Act, with license number 12806. The license was issued on 25 November 2004.

[3] Second Respondent is Deeb Raymond Risk, a male of adult age, a key individual and representative of the 1st respondent. Second respondent is the authorised representative of 1st respondent. At all times material hereto, Complainant dealt with 2nd respondent. For convenience, I refer to 1st and 2nd Respondents collectively as respondent.

B. BACKGROUND

[4] On 15 October 2010, Complainant lodged a complaint with this Office. It appears from the complaint that Complainant had purchased investments in Sharemax Zambezi and Sharemax The Villa property syndication schemes. She complained that the investments were high risk. As a pensioner, she should not have been advised to invest in them.

[5] Complainant's problems began when she read an article in Finweek. After reading the article she telephoned Respondent to obtain information. She was allegedly advised that the sale of the properties was in the pipeline.

Complainant continued to telephone Respondent after five more articles appeared in The Star (newspaper), only to receive what she describes as, 'PR Spin giving no explanation'. On 8 October 2010, she decided to lodge a complaint in writing to Respondent. This letter forms part of the complaint to this Office. On 11 October 2010, Respondent acknowledged receipt of the letter.

[6] In her letter to Respondent, Complainant expresses great concern regarding Respondent's advice to her. She states that all her investments done through the Respondent are in property syndications. Two investments are with two PIC syndications, Highveld 18 and 19 totalling an amount of R263 000.00.

[7] In July 2008 Complainant invested an amount of R110 000.00 into Sharemax Zambezi following advice provided by Respondent.

[8] In June 2009 a further R 210 000.00 was invested in Sharemax The Villa. She states in her letter to Respondent that as a pensioner with limited means, she should have been advised to invest into a 'medium to low risk' investment. Complainant further states that the investments were not in her interests.

[9] Although Complainant received income of R3000 a month from the two investments, such income ceased during or about September 2010. Complainant is further of the view that she has lost her capital of R320 000.00.

C. THE COMPLAINT

[10] Complainant's complaint may be summarised as follows:

[10.1] Following advice by Respondent, Complainant invested an amount of R110 000.00 in July 2008 into Sharemax Zambezi. In June 2009, a further R210 000.00 was invested into Sharemax The Villa. In recommending the investments Respondent is alleged to have failed to properly advise complainant in that he failed to make material disclosures including those of risk and liquidity as required by the General Code of Conduct, for authorised Financial Service Providers and Representatives(the Code).

[10.2] Respondent is further alleged to have failed to comply with the requirement that providers act in the client's interest when rendering financial services. In this regard, Complainant pointed to non disclosure of commission received by Respondent (which she incorrectly terms interest) for advice which saw her investing in a high risk investment.

[10.3] As a result of Respondent's failure to render financial services in compliance with the Code, Complainant states she has not only lost income from the two investments but her entire capital of R320 000. Complainant holds Respondent liable for the loss of her capital.

D. THE RELIEF SOUGHT

[11] Complainant has asked for the payment of the amount of R320 000.00.

E. RESPONDENT'S VERSION

[12] On 15 December 2010, the complaint was referred to Respondent in terms of rule 6 of the Rules on Proceedings, of the Office of the Ombud for Financial Services Providers (the Rules). On 4 February 2011, Respondent filed his response. The response is in the form of an application in terms of section 27 (3) (c) of the Act. The response can be divided into two sections. One section deals with the merits of the complaint and other with whether the Ombud is the appropriate forum to deal with the complaint. It is noted that Respondent states that he does not deal with the merits of the complaint in the application but reserves '*the right to do so if and when it may become necessary to do so*.' However, as will become apparent, respondent does deal with the merits of the complaint. I summarise the response to the merits:-

[12.1] Respondent avers that Complainant was referred to him by one of his established clients in July 2006. At a meeting on 24 June 2008 during a discussion about investments, it was decided that Complainant invest an amount of R110 000.00 into Sharemax Zambezi, prospectus no.4. This investment was paying 12 % per annum until 1 September 2009 and thereafter 10% per annum until the sale of the property. At this meeting, Respondent gave Complainant a copy of prospectus No.4 pertaining to Zambezi Retail Park. In the same meeting, Complainant signed the application form, (annexure "H") which also contains a risk assessment. Respondent also furnished Complainant with a Life

Insurance Investment Portfolio, (annexure "K"), which sets out all her current investments.

[12.2] On 5 June 2009 Respondent met with Complainant to review and discuss her current income and investments detail. At that meeting, Complainant decided to invest a further R210 000, 00 in Sharemax The Villa, (prospectus No.7), which was offering a guaranteed income of 11.5 % per annum until March 2011 and thereafter 11% per annum until the sale of the property. At the meeting Complainant completed an application form for prospectus No.7 (annexure "L") which includes a risk assessment. A Life and Investment Client Advice Record was completed and signed by Complainant on the same day.

[12.3] Complainant clearly understood market investments and property syndications as she had previously invested in them. During the five years he has been Complainant's advisor, they met regularly and often at Complainant's request. In the five years, Complainant's investments were changed either based on respondent's advice or Complainant's specific requests. Respondent further adds that he and Complainant actively monitored her investment portfolio and from time to time changes were made taking into account market conditions and her personal circumstances.

[12.4] Respondent further avers that Complainant sought his advice on numerous financial matters, which advice he gladly provided.

[12.5] The complaint against him was made after Zambezi and The Villa stopped paying interest. The basis for the allegations made against him

seems to be Respondent's failure to timeously respond to negative press reports relating to Sharemax. What is in essence alleged by Complainant is that he acted dishonestly, thus fraudulently or negligently. He denies the allegations and calls them defamatory.

[12.6] Respondent denies that there was high risk attached to the investments. He further denies that the business activities and models of Sharemax were suspect. He denies any prior knowledge thereof. There were from time to time opinions expressed against the Sharemax model but these were balanced out by opinions of other "pundits".

[12.7] Respondent states that there are obvious discrepancies and disputes between the versions of the Complainant and his on essential events. These factual disputes cannot be determined on unattested and untested conflicting versions of events made on paper. Oral evidence under oath and cross examination are required in order for the finder of fact to determine the truth.

[12.8] Regarding the legality of the Zambezi/ Sharemax model and the events surrounding The Villa, Respondent avers that when he assisted Complainant, he was not aware of any questions regarding the solvency and the legality of the business model of the investments. It was only about August / September 2010 that he learnt through the public media that The Villa and Zambezi had defaulted on the interest payable to investors. He then followed the events surrounding the two in the press.

[12.9] He believes that the South African Reserve Bank, (SARB) has appointed judicial managers for The Villa and Zambezi and these eminent persons, Justice Hartzenberg and well respected economist Mr Dawie Roodt have been appointed to its board of directors. His understanding is that every attempt is being made to complete the projects to prevent losses. At this point, it is unknown whether The Villa and Zambezi will recommence payment of interest and completes the projects or whether the two will fail or even be liquidated. Whether or not any investor will lose his or her investment and if so what the loss may be are questions the answers to which are unknown. In Respondent's view, no decision concerning any compensation claimed by Complainant from him may be made before it is determined whether the Zambezi and the Villa will fail.

[12.10] Respondent finally submits no decision can be made concerning his negligence on the grounds alleged by the Complainant, unless it is established whether or not the Sharemax model was legal, what the causes of the non payment of interest were and what was in the public domain when he discussed the investments with Complainant.

F. ISSUES

[13] There are three issues here:-

a. Jurisdiction of this Office;

b. Whether Respondent in rendering financial services failed to comply with the Code.

c. In the event it is found that the Respondent failed to comply with the Code, whether such conduct caused the damage complained of.

a) Jurisdiction

[14] Respondent has raised the point that there are obvious discrepancies and disputes between the versions of the Complainant and his, on essential events. These factual disputes cannot be determined on unattested and untested conflicting versions of events made on paper. Oral evidence on oath and cross examination are required in order for the finder of fact to determine the truth.

[15] For the reasons set out in the 1st Barnes determination[1], in paragraph 18 to 24 this Office has jurisdiction to entertain the complaint.

b) Whether in rendering the financial service to complainant respondent failed to comply with the Code.

[16] Complainant's complaint is that as a result of Respondent's failure to render financial services in compliance with the Code, she lost not only her income with the failure of the Sharemax but her capital of R320 000. She cites that Respondent failed to advise her properly in that he failed to disclose the

[1] **E Barnes v D Risk Insurance Consultants CC and Deeb Raymond Risk (Case Number: FAIS 6793/10-11/GP 1)**

material aspects of the investment including the risk inherent in the investments as well as liquidity. She also alleges that in rendering financial services to her, Respondent failed to act in her interests. In his response, Respondent relied extensively on amongst other things, certain documents signed by Complainant during the rendering of the financial services. The first document Respondent relies on is the Risk assessment marked annexure 'H' which forms part of the Sharemax application form. This document, it would appear, is evidence that Respondent disclosed the risk inherent in the investment as well as liquidity to Complainant. This document pertains to the rendering of financial services in June 2008. A further document which Respondent places reliance on is Annexure 'M' being the client advice record.

c) Risk

[17] Annexure H, the Sharemax application form, is an eight page document. The risk assessment on product information is the last page of the application form. It is dated 24th June 2008 and is signed by Complainant and respondent. It is indicated in the document that its purpose is to ensure that the investor understands all benefits and risks involved in the investment.

[18] The first question in this form asks whether the advisor gave Complainant the prospectus. The answer inserted is yes. Prospectus No.4 pertaining to Sharemax Zambezi is a 100 page document. It is difficult to see how giving a 100 page document with convoluted legal terms, with several references to

different pages before one actually deciphers the meaning of a particular clause could have helped Complainant appreciate the material terms of the investment she purchased. Such conduct goes against the spirit of the Code. Part II section 3 (1) of the Code demands that information furnished to clients be in plain language and avoid ambiguity. It is no wonder that the Respondent himself is not able to make a positive statement that he disclosed risk. Instead, he denies that there was high risk in the investment. There is no question that the investment in Sharemax Zambezi and The Villa were high risk investments. Respondent's denial that the products were of high risk simply means he had no appreciation of the product he sold to Complainant. The Code requires providers to disclose material aspects of the financial product so that clients make informed decisions. Complainant could not have been in an informed position when she agreed to purchase the product.

[19] The second question asks whether the advisor informed you that this product should be seen as a medium to long term, meant for a horizon of not less than five years. The answer recorded is yes. The answer recorded here is clearly inconsistent with the information appearing in annexure 'M', the record of advice, which states that the investment is available at any time subject to a penalty of 5 %. The two statements are not reconcilable. I conclude that the question of liquidity of the investment was not disclosed during the rendering of financial services. This is a violation of the Code. Complainant needed to know that the investment will not be available before a period of five years is over. I cannot find anything in this document that reveals that the risk and liquidity of the investment were disclosed.

[20] Annexure "K" contains no information relevant to risk or liquidity Annexure L is the Sharemax application form completed for the investment of R210 000.00. It was signed on the 5th of June 2009. Once again, Respondent relies on the risk assessment form attached to this application form. A cursory perusal of annexure L reveals the following:

The first question asks, 'did your advisor provide you with a registered prospectus. This pertains to the 106 page prospectus No. 7 in respect of The Villa. The answer is yes. The next question pertains to liquidity of the investment and asks whether the advisor informed the Complainant that the product should be seen as a medium to long term investment meant for a period of not less than five years. The answer is yes. I have already pointed that earlier on, Complainant was informed that the investment is available at any time subject to a 5 % penalty. Respondent did not correct that understanding whilst asking the Complainant to sign for something else on paper in respect of this investment.

[21] A further document which Respondent relies on is annexure 'M' which is titled Life and Investment Client Advice Record. This document is dated 5 June 2009. Section A of this document contains a summary of information used. The first part of section A of this document sets out the client's objectives: The words, 'Maximum Income and Capital Growth' are filled in. The financial situation of the client is set out as: 'Financially Independent, Investments + UK Pension. The current product experience is set out as: 'Understands stock

market investments and property syndications as client has invested previously in the above.

[22] It is common cause that all of the four investments which went into property syndications were made on the basis of advice of the respondent. There is no evidence that Complainant had ever invested in property syndications before then. The conclusion drawn by Respondent in his responding affidavit and in this document about Complainant's understanding of property syndications and financial markets must therefore be questioned. In addition, there is no evidence supporting that conclusion. In any event, Respondent on his own version has denied that these two investments, Sharemax Zambezi and The Villa were high risk investments. This brings to question his ability to appropriately advise Complainant. As will be demonstrated in this determination, the two investments are high risk.

[23] Section B of the document lays out the client's needs and goals identified. The need/goal identified and addressed is post retirement income. It is marked as number one priority with Complainant's risk profile set out as medium. On page 2 of the same document section C sets out the products considered. The product considered is Sharemax the Villa, prospectus No.7. Section D sets out the initial recommendation/ advice and motivation. The product recommended is Sharemax The Villa. This is what appears under motivation: 'No upfront charges to client. Lump sum investment. Sharemax is

THE PREFERRED PROVIDER with 10 year track record. Income 11.5 % p.a until March 2011 thereafter 11% escalating at 4 % p.a.'

[24] The application form and the prospectus state clearly that there are in fact upfront charges to be paid by the Complainant. The notice contained in paragraph 15 of the application form states that 10% of the invested amount will be released to the Promoter to be utilized for payment of the commission. The paragraph further carries a promise made by the promoter that it will eventually pay all commissions and also makes reference to paragraph 25.3 of the prospectus. Paragraph 25.3 essentially states the same thing. The statement therefore that there are no upfront costs to the complainant is in fact false. Respondent ought to have disclosed fully and unequivocally that complainant is paying for his commission and then relay the promise of the promoter. Later on in this determination, I deal with the question of track record.

[25] Section E sets out important information highlighted to client. This is what is inserted: '(1) Medium Risk as country RSA is an emerging market

(2) Property can be sold at any time subject to 5 % penalty.....'

I have no idea what Respondent was aiming at by the two statements in this section. The statement that there is medium risk is supposedly referring to the risk in the investment. The statement regarding liquidity of the investment is a further concern. Here respondent states that the property can be sold at any

time subject to a 5 % penalty. This is indication that respondent either did not believe what is in the application form and the prospectus or he simply never read the two documents. The statement is put so carelessly that Complainant would have believed that the investment is indeed liquid subject to the penalty of 5 %, yet another instance of confusing the client as opposed to properly advising her.

[26] Section F sets out the Financial Advisor's declaration. It begins by stating:

'The client has elected not to accept the following product recommendations: Voluntary annuity and money market.'

'For the following reasons: Capital can be eroded after 5 years as a result of inflation. Invest rates declining.'

'The consequences thereof have been clearly explained to the client. 'Yes'.

[27] The Complainant was not offered any choices. The intention was always to sell her the Sharemax The Villa investment. Respondent here was simply paying lip service to the Code. In section C of this same document it is clear that there was never anything else suggested to Complainant to address her need of post retirement income. To now suggest that Complainant went against that advice is unfair. In any event, he does not state why the two Sharemax products are likely to address Complainant's needs as the Code requires.

[28] At this point, it is perhaps apposite to mention that a provider's duty is not to allow him or herself to be merely used as a conduit between the client and the product provider. A provider is required to advise a client and act fairly towards her. In instances where the client chooses to go against the provider's advice, the Code makes provision for the provider to warn the client of the possible implications of not following his or her advice and then record such advice and warning. So, even if Complainant, on her own accord, which is highly doubted, chose to invest in the Sharemax investment which is a mismatch to her risk profile, Respondent still had a responsibility to comply with the relevant section of the Code.

[29] The Code in Part VII, section 8 (1) (a) to (d) states that a provider must take 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. The provider must also conduct and analysis to identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to limitations imposed on the provider under the Act or any other contractual arrangement.

[30] Section 9 (1) (a) to (d) states that providers must maintain a record of advice furnished to a client as contemplated in section 8. Such record must reflect

the basis on which the advice was given, and in particular a brief summary of the information and material on which the advice was based, the financial product/s considered and the financial product/s recommended with an explanation of why the product or products selected is or are likely to satisfy the client's identified needs and objectives. First, Respondent's results of Complainant's risk profile indicate that she is a medium risk but he then suggests to complainant that she invests in a high risk investment. This is a violation of the Code. Respondent's record of advice falls short of the requirements of section 8 (1) (a) to (d) and 9(1) (a) to (d) of the Code.

[31] Section G of annexure "M" contains the client declaration. At least one thing stands out in this section. Paragraph 4 of this section states, 'The quotation(s) for the product(s) selected was shown to me and the principal terms and conditions explained to me. I have been informed of and understand all costs, charges, penalties, liquidity limitations and tax implications, where applicable. I understand the risks/guarantees (or absence thereof) associated with the products and or underlying funds selected'. I have already pointed out that costs, liquidity and risk were not disclosed.

Risk inherent in the Sharemax Zambezi investment

[32] The analysis of the prospectus pertaining to Zambezi Retail Park No. 4, reveals the following:-

(i) Page 4 of the prospectus opens with the warning that the shares on offer are unlisted and should be considered as a '**risk capital investment'.** (my emphasis) Investors are therefore at risk as unlisted shares and claims are not readily marketable and should the company fail this may result in the loss of the investment to the investor. I have not seen anywhere in Respondent's papers that he warned Complainant that she could potentially lose her capital. Annexure M, the client advice record instead contains statements that do not assist Complainant. (refer in this regard to paragraphs 23 and 25) I have no doubt Complainant would not have invested in these investments had she been told she could lose her capital of R320 000.00. This is material and ought to have been disclosed to her. I have seen what is normally called 'sales pitch', which invariably means, one deals with those points that will sell the product. A provider acting in the client's interest will put the material information before the client and advise his or her client accordingly.

(ii) On the same page, it is stated that the offer by Sharemax Zambezi Retail Park Holdings Limited is for a subscription for 63 000 linked units. Each unit consists of 1 ordinary par value share of 0,00001 and one **unsecured floating rate claim** with a value of R999,9999 linked together in a Unit at R1000 per unit by way of a public offer. I have not seen anywhere in the record of advice that complainant was aware that she was investing in an unsecured floating rate claim. I also have not seen anywhere that the legal implications of this type of investment

were disclosed to her. In any event, it is doubtful that Respondent understood what this meant at the time.

(iii) **The parties**: The Company is described as Sharemax Zambezi Retail Park Holdings Limited. For convenience, I refer to this company as (Holdings). The promoter is Sharemax Investments (Pty) Ltd, (Sharemax). Then there is Sharemax Zambezi Retail Park, (Pty) Limited company, (Zambezi Retail). Page 14, paragraph 4 deals with the history and state of affairs of the company and its future subsidiary. It is stated in the paragraph that Holdings was registered in 2006. Holdings has never traded before registration of the prospectus and has not made any profit whatsoever. Sharemax owns 100 % of Zambezi Retail. The latter is the entity that concluded the sale of business agreement with Capicol (Pty) Ltd. It was meant to be the eventual owner of the immovable property.

(iv) The directors of Holdings, Sharemax and Zambezi Retail are the same. The company secretary for Holdings is one of the directors. In terms of paragraph 3.3 which deals with appointment of directors, the four directors of Holdings, will constitute the board of directors until the first annual general meeting, thereafter members of the Holdings shall appoint directors to the board, provided that the promoter shall have the right to have at least three directors on the board for the first five years after date of registration of the prospectus. The number of directors shall not be less than three and not more than five.

(v) I have not seen anywhere that it was disclosed to Complainant that she was investing her retirement capital in a company that has never

traded before. Precisely what matched Complainant's risk profile to an investment in a company of such high risk has not been disclosed by the Respondent. The statements contained in this paragraph of the prospectus belie Respondent's claim of a ten year track record. The truth is, Complainant's investments went into a company with no track record. An investment where one could potentially lose one's capital is of a high risk. In the record of advice, annexure "M", reference is made to Sharemax being the preferred provider with a ten year track record. Exactly what Respondent was referring to in this regard is unclear. Given that this is what was sold to Complainant, it was misleading. Complainant needed to know that she was investing her retirement funds into a company that has never traded and no track record to talk of.

(vi) Respondent has made much of Complainant's investment being in property. I have not seen anywhere that Complainant was made aware that Holdings, the unlisted public company into which her funds went into, had only one asset, the shareholding in a private company, Zambezi Retail. All three companies, Holdings, Zambezi Retail and Sharemax are controlled by the same persons. Herein lies the danger, private companies do not have their affairs being subject to public scrutiny. They are not obliged to have their financial statements publicised. They are also not subject to the myriad of compliance and regulatory checks as publicly listed companies are. The promoters, Sharemax, have even gone as far as ensuring that at least three of their directors will be there for five years from date of registration of the

prospectus. A provider acting with due skill, care and diligence and in the interest of his client would have asked himself, if the two major players, namely the two private companies are controlled by the same persons, how is accountability and transparency going to be enforced and how is investor protection going to be ensured. Respondent could not have applied his mind to this.

(vii) Respondent does not appear to have ever questioned how governance and risk to investors was to be managed given that all the three companies are run by the same individuals. There is also no mention in his records of what risk mitigating factors he took into account given that Holdings had never traded before.

[33] On page 18 in paragraph 4.3 it is stated that the company, referring to Holdings, will operate as a holding company and intends utilizing the proceeds of this fourth offer to:-

(i) Pay part of the purchase price, being R10 481 955.00 in respect of the entire shareholding in Sharemax Zambezi, purchased from Sharemax for an amount equal to 16.64% of the purchase price to be paid by Sharemax Zambezi for the business.

(ii) Holdings also intends to advance an unsecured loan funding in the amount of R50 000 000.00 to Zambezi Retail for the purpose of paying part of the purchase price which is to be paid to purchase the immovable property from Capicol. The purchase price is projected at R930 000 000. It is stated in the document that the actual purchase price will be calculated thirty days after the date of occupation. Exactly

what questions respondent raised with regard to the projected purchase price remains a mystery and the purpose behind the unsecured loan also remains unclear.

(iii) Precisely why investors' funds had to be utilised to pay Sharemax for Zambezi Retail's shareholdings and what it is that investors received, is unclear. Paragraph 29 of the prospectus states that the eventual borrower of the monies raised through the claims will be Zambezi Retail, the private company. Here we have the debtor and creditor being substantially the same person. It is fair to conclude that Respondent never read the prospectus, for if he did and understood prospectus No. 4 he would have appreciated the risk Complainant was facing.

(iv) Respondent has further mentioned that when he assisted Complainant to invest in the Villa and Zambezi he was not aware of any questions regarding the solvency and legality of the business model of the two. It was only about August / September 2010 that he learnt through the media that the Villa and Zambezi had defaulted on the interest payable to investors. This is indeed astounding. The first thing Respondent should have satisfied himself with before he recommended the investment to Complainant were precisely those elements. He ought to have done due diligence on Sharemax. This means, going beyond the material supplied by the company. In actual fact, the funding model of Sharemax is contained in the prospectus and the solvency inferences can be made from there. Had he read and understood the prospectus he ought to have appreciated the deficiencies. A further point to be

made here is that Respondent has not stated the steps he took to establish the underlying economic activity that was meant to generate the return promised to investors. Given that the return was paid while both properties in the two investments, namely, Zambezi and The Villa were still in construction, he ought to have raised questions about the viability of the investments.

[34] It is Respondent's case to this Office that the investment was not high risk. It is evident from the prospectus he supposedly discussed with Complainant that these were in fact a high risk investment. Respondent's assertion that Complainant understood property syndication investments because he had invested in them before leaves much to be desired. Complainant was in fact in a precarious position as he depended on Respondent who knew very little about the investment he was selling. In his response to this Office, Respondent makes the point that Complainant continuously sought his advice on numerous financial matters, which advice he gladly provided. This is hardly the kind of behaviour one would expect from an astute investor who understands property syndications.

(i) Liquidity

a) According to Prospectus No. 4 pertaining to Zambezi, paragraph 4.6 makes it clear that claims are repayable only in the event of winding up of the company or on disposal of the immovable property. Paragraph 5.15 which deals with the resale of shares states ' ...an investment in Immovable Property must be regarded as a long-term investment,

usually not less than five years. The recommended investment period is therefore not less than five years..... When Sharemax assists investors to dispose of their Units, Sharemax will charge a market-related cost of sale which will not exceed 10 % plus Vat and which will not be less than 5 % plus Vat of the selling price of such Units.'

b) Paragraph 5.16 states that 'Investors should note that there is a substantial risk in that the investor may not be able to sell his shares should he wish to do so in the future.'

c) Paragraph 5.3.2 states: ' .....Sharemax shall not provide any assistance in this regard to investors if such sale is to take place within the first 24 months of the investment.' Paragraph 5.3.3 draws the investor's attention to the fact that it is not the function of the promoter to find a buyer should the investor wish to sell his shares.

The prospectus is clear, the investment must be looked at as a long term one with a minimum period of five years. The record of advice instead contains a sweetener that a penalty might be applicable in the event Complainant sells within the first 12 months. This is not what Complainant is contracting for in terms of the prospectus. On Respondent's own version none of the material issues pertaining to liquidity contained in the prospectus were disclosed to complainant.

(ii) Risk and Liquidity inherent in The Villa Investment

(e) I have dealt with these in detail in the Barnes(2)[2] determination. Respondent has provided no proof to this office that he disclosed the risk and liquidity aspects of The Villa investment.

G. FINDINGS

a) I am satisfied that respondent failed in his duty to comply with section 8 and 9 of the Code whilst rendering financial services in respect of both the Zambezi and The Villa investments.

b) Respondent further failed to disclose the material aspect of liquidity regarding both the Zambezi and The Villa. His contention that Complainant was fairly knowledgeable about property syndications is not supported by his own records. On the contrary, the facts would lead any fair minded person to conclude that Complainant was depended on respondent's advice. Respondent exploited that dependency by recommending financial products with high risk and failed to disclose such.

c) Respondent's insistence that the investments were not high risk is untenable.

d) Respondent also failed to make accurate disclosures to Complainant as required by the Code regarding how the return was to be paid. Even though the building of the properties was nowhere near completion, Respondent did not question where the return was going to come from in order to understand the viability of the investment and to accurately disclose this to Complainant.

[2] **E Barnes v D Risk Insurance Consultants CC and Deeb Raymond Risk (Case Number: FAIS 6793/10-11/GP 1 (2))**

e) Respondent failed to disclose costs in respect of both investments.

f) Respondent failed to appropriately advise Complainant in that even though in his finding, he concluded that Complainant was a 'medium risk', he failed to recommend products commensurate with Complainant's risk tolerance in addressing her need of post retirement income.

g) Respondent failed to act with due skill, care and diligence in the interest of his client and the integrity of the financial services industry.

h) Respondent's contention is that no decision can be made on the question of his being negligent until the question of the legality of Sharemax funding model has been decided upon. The instances of non compliance with the Code which directly led to Complainant's loss can be determined independently of the question of the legality of Sharemax's funding model. These are matters of compliance with the FAIS Act and the General Code. Providers must understand the products they advise clients on. On Respondent's version, it is difficult to conclude that he understood the product. He was out of his depth. Respondent's contention in this regard must therefore fail.

i) Respondent's contention that complainant's complaint is premature as no one has answers as to whether the companies will succeed or not is also irrelevant. The issue is not whether some monies will be recovered by Complainant at some future unknown date. The test is whether the advice, given Complainant's circumstances was appropriate. The advice provided was clearly inappropriate and not relevant to Complainant's circumstances.

j) I have found no evidence that Complainant is a person knowledgeable in property syndications. I am persuaded to conclude that the Complainant will still not understand the two prospectuses relevant to the investments she purchased.

k) I have already disposed of the question of appropriateness of this Office to deal with this complaint. I do not deem it necessary to deal with Respondent's submissions in this regard. It is clear that there is no material dispute of fact in the matter.

H. QUANTUM

[35] Complainant invested R320 000 in Sharemax Zambezi and The Villa. Complainant has also not been paid any income since September 2009. It is now 2012. All of this supports Complainant's contention that she has lost her capital of R320 000.00. I intend therefore to make an order in the amount of R320 000.00 in this regard.

I. ACCOUNTABILITY

I deem it appropriate that I deal with the issue of joint and several liability of the Respondents herein. I have held that the 2nd respondent failed to comply with the Code in the rendering of the financial service herein. 2nd respondent is a member and key individual of 1st respondent. If I were to hold 1st respondent solely liable this would not be in line with what the legislature

intended as evidenced by section 8 of the FAIS Act. I say so for the following reasons:-

(a) In terms of section 8 (1) (c) of the FAIS Act in instances where a financial services provider is, amongst others a corporate body, the applicant for licensing must satisfy the registrar that any key individual in respect of such applicant complies with the requirements of personal character qualities of honesty and integrity; and competence and operational ability'. It is only when the registrar is satisfied that that an applicant meets these requirements that a license will be granted.

(b) Additionally 'no such person may be permitted to take part in the conduct or management or oversight of a licensee's business in relation to the rendering of financial services unless such person has on application been approved by the registrar.

(c) Section 8 (5)(ii) additionally requires that upon the change in the personal circumstances of a key individual a registrar may impose new conditions on the licensee. From the obligations imposed on the key individual it is clear that it is the key individual himself that is personally responsible to satisfy the registrar that he is fit and proper. Authorisation of the entity is approved through the key individual himself.

(d) The fact that where the key individual does not meet the legislative requirements of fit and proper, the corporate entity's license can be

withdrawn simply means the intention of the legislature is to hold both persons accountable. The General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code) clearly envisages that the general and specific duties of a provider of financial services are those that are performed by a natural person as opposed to an artificial persona. This is evident in:-

(i) the definition of provider includes a representative;

(ii) the general duty of a provider in Section 2 of the Code requires that financial services be rendered with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry. This can only be performed by a natural person;

(iii) The various specific duties regarding the rendering of a financial service set out in section 3 require human intervention;

(v) So too all the requirements set out in Parts III, IV, V and VI.

1st Respondent is the licensed provider under whose name the financial service was rendered. On his own version, 2nd respondent, according to B1, is an authorised financial services provider and key individual of 1st respondent. Therefore, it is necessary that I hold both respondents liable jointly and severally, the one paying the other to be absolved.

J. ORDER

In the premises the following order is made:

1. The complaint is upheld;

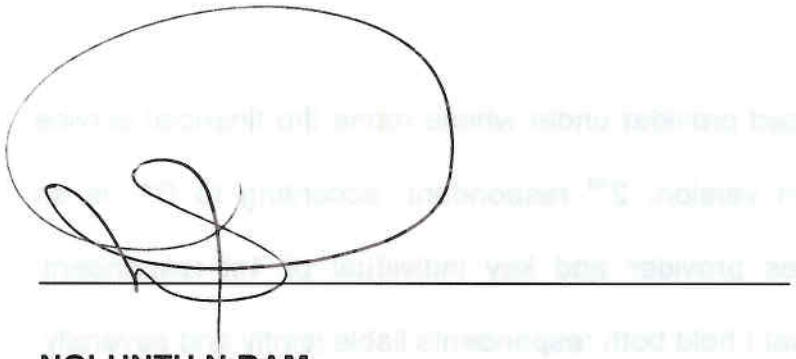
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to Complainant the amount of R320 000,00 in respect of the investments in the Zambezi and The Villa;

3. Complainant is to hand over, upon full payment, all documents and securities, forgo any rights or interest pertaining to the investments in Zambezi and The Villa in favour of respondents;

4. Interest at the rate of 15.5 % , from a date seven (7) days from date of this order to date of final payment;

5. Respondents are to pay a case fee of R 1000, 00 to this office within 30 days of date of this order.

DATED AT PRETORIA ON THIS THE 1st DAY OF FEBRUARY 2012.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS