IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 06520/10-11/GP 1

In the matter between:-

MARGERY ISOBEL MARY SALMOND	**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 Margery Isobel Mary Salmond, a female, retiree of Randges Estate, 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. In this determination, for the purposes of convenience, I refer to 1st and 2nd respondent as respondent.

B. BACKGROUND

[4] On 18 October 2010, complainant lodged a complaint with this Office. The gist of the complaint is set out in the complaint registration form. It reads:-

'My lifetime savings of R780 invested in Sharemax Zambezi Retail Park Holdings are not accessible and monthly payments of 6500 was last in July 2010. The investment was made on the recommendation of Financial Advisor Deeb Risk of D Risk Insurance Consultants (Pty) Ltd, ...Mr Risk did not inform me that it was a high-risk investment and he did not disclose the high commission he would receive. The investment was to afford me the advantage of capital growth. It would not alter the interest I have been receiving from my capital. On 07/07/2010, Mr Risk urged me to invest a bequest in The Villa. I did not follow his advice.'

[5] In her complaint, complainant included a letter she had earlier addressed to respondent regarding her investment in Sharemax. The letter forms part of the complaint and is dated 11 October 2010. According to letter, sometime during October 2008, at the age of 82, complainant was advised by respondent to invest in a Sharemax scheme known as the Zambezi Retail Park Holdings, (Zambezi).Complainant alleges that respondent failed to inform her that the investment was high risk. He also failed to disclose his commission, which complainant subsequently discovered was 11 %.

[6] Complainant further made the point that she expected the sale of the property (referring to the Zambezi property) in about November 2009, (one year later). In this regard, she refers to a Sharemax memorandum dated 4 November 2008. She ends her letter by questioning whether respondent did not have prior knowledge of the difficulties in which Sharemax has found itself. She states:

'*I question a Financial advisor that failed to appreciate the need for diversity in investments. All but a small amount of my capital was invested in property. I question a Financial Advisor who does not appreciate the need for liquidity in the assets of an aged person.*'

C. COMPLAINT

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

[7.1] Following advice by respondent complainant invested an amount of R780 000.00 into Sharemax Zambezi. In rendering the financial services to complainant, respondent is alleged to have failed to

properly advise complainant in that he failed to make material disclosures including risk, liquidity, and costs as required by the General Code of Conduct, (the Code).

[7.2] Respondent is also 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 the commission received by respondent of 11% while her investment was placed in a high risk investment.

[7.3] As a result of respondent's failure to render financial services in compliance with the Code, complainant claims she has lost her capital of R780 000.00. Complainant holds respondent liable for the loss of her capital.

D. THE RELIEF SOUGHT

[8] The complainant has asked for the payment of the amount of R780 000.

E. RESPONDENT'S VERSION

[9] On 4 November 2010, the complaint was referred to the respondent in terms of Rule 6 of the Rules on proceedings of the FAIS Ombud, (the Rules). On 17 January 2011, respondent filed his response in the form of an application. 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 the other deals with whether the Ombud is the appropriate forum to deal with the complaint. In this application, respondent also attached supporting documents relating to the rendering of the financial service. 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:-

[9.1] Respondent acknowledges that he met complainant as a result of a referral by one of his clients sometime in December 2003. He has acted as complainant's financial advisor for the past seven year. During this period, he and complainant have actively monitored her investment portfolio.

[9.2] He has assisted complainant from time to time with her tax returns and other advice on existing annuities and pensions at no cost to her. In 2005 complainant discussed with him the idea of selling her flat and buying into a retirement village.

[9.3] Complainant is well versed in financial matters. She took active part in her investment portfolio. She would contact him from time to time to discuss her investment portfolio and then instructed him to make a particular change on investment. It was clear to respondent from the questions posed by complainant that she had a clear understanding of how financial markets work. Complainant had never complained about bad advice or bad service until the Sharemax issue arose sometime in

July 2010. It is at this point that respondent formed the impression that complainant did not want him to assist her any further. In September 2010, respondent indeed confirmed this when he received a letter from Investec advising that complainant had appointed someone else to represent her.

[9.4] Respondent is accredited by Sharemax to market its products. The latter is an authorised financial services provider.

[9.5] On 13 November 2008 respondent met complainant with a view to assist her with her tax matter. During this meeting, they discussed the world economy in particular the collapsing American and European markets. Based on the discussion, respondent recommended that complainant invest some of her portfolio in Sharemax (Zambezi Prospectus No.8). Respondent says he recommended that complainant invests R780 000 in the Zambezi 'as it was offering an excellent income of 12% per annum in the first year and then 10% per annum together with capital growth'.

[9.6] Respondent provided complainant with a copy of Prospectus 8 of Sharemax Zambezi Holdings Limited and discussed the contents with her. Respondent further adds that he is satisfied that complainant understood the investment and the contents of the relevant prospectus. On 24 November 2008, complainant instructed respondent to invest R780 000 in Sharemax Zambezi. Respondent refers to annexure "B" being the Sharemax application form used to invest complainant's

funds. The application contains a 'Risk Assessment on Product Information'.

[9.7] Complainant confirmed that she was very well versed on the product in which she was investing. In support thereof, respondent refers this Office to annexures "C" and "D" respectively being the Life and Investment Client Advice Record completed by complainant in years 2007 and 2008. Respondent further submits that he completed two separate risk profile questionnaires. One was completed on 1 October 2007 marked annexure "E" and one completed on 24 November 2008 and marked annexure "B". Annexure B is in fact a risk assessment on product information. This document is part of the Sharemax application form.

[9.8] Respondent met with complainant again in July 2010. Complainant informed him that she had inherited an amount of R271 000. They discussed how the amount should be invested as complainant needed maximum income. He recommended Sharemax the Villa which was paying at the time 12 % per annum. At the time, the Villa was paying an excellent return '*as money markets were dropping to all time lows*'. In response to respondent's recommendation of Sharemax, complainant said she would think about it.

[9.9] Respondent has attended a number of seminars presented by Sharemax over the years and is *au fait* with its projects. Respondent's experience of Sharemax projects over the last eleven years is that all Sharemax projects have performed exceptionally well. They had an

established track record and when complainant invested he had no reason to doubt the success of the projects. Zambezi initially paid interest to complainant until September 2010. For reasons unknown to respondent, interest payments ceased.

[9.10] Respondent denies that the Sharemax investments were done in his best interests. At all times, he considered complainant's needs, interests and requirements. In his view complainant fully understood all the discussions they had and agreed with the recommendations. Respondent further denies that Sharemax paid him commission of 11%. He avers that he was paid 6 % and that complainant was fully aware of this. Furthermore, the prospectus discussed with and furnished to complainant refers to commission payable.

[9.11] He denies that there was high risk attached to the investment. He states that complainant's signature to the various documents confirms that risk was fully disclosed to her.

[9.12] He further 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 on oath and cross examination are required in order for the finder of fact to determine the truth.

[9.13] About the legality of Sharemax Model and the events surrounding the Villa and the Zambezi, respondent states that when he assisted complainant to invest in the Villa and Zambezi, he was not aware of

any questions regarding the solvency and the legality of the business model of the two. 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.

[9.14] He believes that the South African Reserve Bank, (SARB) has appointed judicial managers for the Villa and Zambezi and that 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 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 complete 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.

[9.15] 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

[10] 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

[11] 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. Respondent raised the same defence in the first Barnes determination[1], which defence was dismissed. For essentially similar reasons, which may be summed up as, all allegations made by complainant are matters of compliance with the Code which can and are answerable by records maintained by the financial services provider. This defence is therefore dismissed.

[12] I note, whilst there is no evidence that respondent ever responded to complainant's letter of 11 October 2011, he was nevertheless obliged in terms

[1] FAIS 6793/10-11/GP 1 para 18-24

of the Act to refer complainant to the FAIS Ombud. He did not. On his own version he obfuscated this particular issue to complainant. I refer in this regard to annexure "B", the Sharemax application form furnished by respondent to complainant. Page 4 clause 14 of the form contains a heading, 'Ombud for Financial Services Providers'. Below the heading, it is stated, '*the Promoter has received authorisation in terms of Section 8 of the financial advisory and intermediary Services Act 2002, to act as an Intermediary Services Provider. The Financial Services Board issued a license to the Promoter on 16 September 2005 under licence No 6153.*' This text, in spite of the heading, contains no reference to the FAIS Ombud. This is the kind of convoluted communication respondent, without hesitation, was happy to pass to complainant. Respondent should have pointed this discrepancy to the authors of the document. On his own version, respondent failed to comply with Part XI section 19 of the Code.

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

[13] Several issues have been raised by the complainant. These are:

a) non- disclosure of material aspects of the investment including risk, liquidity and costs; and

b) failure to properly advise her.

[14] Linked to the alleged non disclosure of amongst others, risk, liquidity and costs is the failure to comply with the replacement protocol as provided for in

the Code. Based on respondent's version, the Sharemax transaction was a replacement. I could not find anything from respondent's papers in support of the requirements of Part VII, section 8 (i) (d) of the Code. The section provides that a provider must, where the financial product is to replace an existing financial product wholly or partially, fully disclose to the client the actual and potential financial implications, costs, and consequences of such a replacement, including, where applicable, full details of-

(i) fees and charges in respect of the replacement product compared to those in respect of the terminated product;

(ii) .....

(v) the material differences between the investment risk of the replacement product and the terminated product,

(vi) penalties or unrecovered expenses deductible or payable due to termination of the terminated product,

(vii) to what extent the replacement product is readily realisable or the relevant funds accessible, compared to the terminated product.

[15] I have perused all documents submitted to this Office and nowhere is there a comparison in respect of fees and charges for the terminated and replacement product. I have also seen no comparison in respect of liquidity and risk as the section demands.

Disclosure of risk and liquidity

[16] Amongst the documents respondent refers to is a document titled Life and Investment Client Advice Record, (Client Advice Record), Annexure "D". Respondent asserts that the complainant's signature on this and other documents confirms that risk attendant to the product was fully disclosed to her. For convenience I comment on each of the sections of the document as I go along. An analysis of this document reveals:

[17] 'Section A titled **A:** Summary of information used:

Clients Objectives: Maximum Income coupled with capital growth

Financial Situation: Lives off annuities, pension and investments

Current product experience: Very well versed'.

Complainant is said to be living off annuities, pension and investments. I have also perused annexures G and H which set out complainant's investment history and could find no basis for the conclusion that she was well versed in an investment in property syndication. The only rational conclusion is that the statement was simply made to suit respondent's intention to sell the investment in Sharemax Zambezi.

[18] 'Section C: Products Considered: The response reads, 'Sharemax Zambezi Retail Park'.

'Section D: Recommendation/Advice & Motivation (ensure all needs identified in section B are addressed)'. The following appear:

The recommended product is 'Zambezi Retail Park'.

'Motivation:

(1) No upfront fees or charges to the investor;

(2) Client investing a lump sum;

(3) Sharemax Preferred Provider with excellent track record'.

It is not surprising that the product selected was Sharemax as this was the only product was considered. The motivation that there are no upfront charges to the investor is in direct conflict with the respondent's response to this Office that costs were disclosed. Respondent went further and claimed that complainant knew that he was paid 6 % commission. The two versions are irreconcilable. The statement that there are no upfront charges is also undermined by what appears in paragraph 15 of annexure "B", the Sharemax application form, which states that once the cooling off period is over an amount equal to 10% of the invested amount will be released to the Promoter to be utilized for the payment of commission. In addition, paragraph 5.9 of the prospectus spells it out that the investors are in fact paying for marketing fees. It is precisely this kind of unfair spin that the Code seeks to protect consumer from. In this regard, the Code demands that information communicated by providers to clients during the rendering of financial services must be accurate, in plain language, and avoid ambiguity to enable clients to come to an informed decision. This Pontius Pilate conduct is not only unfair to the consumer but undermines the integrity of the financial services industry.

[19] **Section E : Important information highlighted to client (eg, risks, tax implications, liquidity, legislative restrictions, exclusions, consequences of replacement, etc)**:The response set out reads:

'Property syndication

Income taxable as Interest;

Funds not liquid until property sold;

Shares purchased in property subject to Companies Act;

Sale of property subject to capital gains tax'

Apart from stating that respondent has not explained what he meant when he said shares in property are subject to the Companies Act, I am sure that the 82 year old, as active and well versed as she is will simply not understand what respondent meant in this regard. On his own version, respondent disclosed neither risk nor liquidity associated with the investment in Sharemax Zambezi.

[20] **Section F: Financial Adviser's Declaration**: This is what appears:

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

For the following reasons: Rates set to decrease in 2009.

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

The statement that client has elected not to accept the product recommendation, 'money market' is ridiculous. Respondent was simply

paying lip service to the requirements of the Code. Complainant was not offered any other product other than Sharemax Zambezi. Section 9 (i) (b) and (c) of the Code demands that a provider must set out the financial products considered and the financial product/s recommended with an explanation as to why the product or products selected is or are likely to satisfy the client's identified needs and objectives.

[21] **Section G: Client Declaration. '(Pls note that it is of utmost importance that you read this section carefully and understand fully. All blocks must be initialled by the client to indicate acceptance)**'. Of importance here are Blocks 4 and 5. Block 4 reads:

'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 elected'.

Block 5: 'I confirm that the financial Advisor has made enquiries to ascertain whether the product (s) selected are intended to replace any existing financial products held by me and where applicable, has informed me of the financial implications, costs and consequences of replacement. In respect of all these blocks, complainant has signed'.

[22] This section perhaps represents the last bastion of respondent's claim that material disclosures were made. Respondent's conduct flies in the face of the Code. It cannot assist respondent as this is nothing but lip service defence.

[23] Two further annexures are important for testing respondent's claim that risk was disclosed to complainant. These are annexure "B", the Sharemax application form and annexure "D", the Personal Portfolio Risk Profile Questionnaire. Of relevance in annexure "B" is a page attached to the application form titled Sharemax Investment Risk Assessment on Product Information. There are six questions on this page. Each question provides two boxes for a 'yes' or 'no'. Only the first two questions are relevant for the purposes of testing disclosure of risk and liquidity. The first question asks: Did your advisor provide you with a registered prospectus? The 'yes' boxed is ticked. The next question asks: Did your advisor inform you that this product should be seen as a medium to long term investment for an investment horizon of not less than five years. The 'yes' box is ticked.

[24] The act of handing over a 99 paged prospectus with legal jargon most of it convoluted with several references to various pages before one can decipher the true meaning of any one paragraph is simply not disclosure of risk as the Code requires. On his own version, respondent did not disclose risk.

Liquidity

[25] Prospectus No. 8 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 ' *As every astute investor knows, 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.*'

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.*'

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.

[26] Complainant in her letter of 11 October 2011 to respondent makes the point that she expected a sale of the property in about November 2009 in terms of a Sharemax Memorandum dated 4 November 2008. She also says she asked about this in February 2010 and was told there was a delay. First respondent fails to specifically challenge this. Second, respondent's own client advice record does not make any reference to the effect that complainant is aware that she is purchasing an investment the minimum period of which should be five years. The only rational inference to be drawn is that complainant must

have been told her funds would be paid within one year from date of investment.

The Code requires providers to disclose material aspects of the product in such a manner that clients are in a position to make an informed decision. The record should speak for itself that this element of the investment was disclosed. It does not.

Risk inherent in the Sharemax Zambezi investment

[27] 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'.** (own 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 loose her capital. I have no doubt complainant would not have invested in this investment if she was told she could lose her capital of R780 000.00. For his part, respondent, apart from dissuading complainant from entering into this investment simply denies that the investment was high risk. I can see no other reason for this oversight other than that respondent did not understand what he was selling to complainant.

[28] On page 4, 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.

[29] **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 have 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.

[30] 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.

[31] 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. All he has done is deny that this is a high risk investment. This, despite the warning appearing on page 4 of the prospectus he claims to have discussed with complainant. Here is the point, in the record of advice, annexure "D", reference is made to the excellent track record of Sharemax. 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.

[32] I have not seen anywhere that complainant was made aware that Holdings, the unlisted public company into which complainant's funds went into, had only one asset, the shareholding in a private company, Zambezi Retail. 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. All three companies are said to be controlled by the same people. 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 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, transparency going to be enforced and how is

investor protection going to be ensured. Respondent could not have applied his mind to this.

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

[34] Page 18 of the prospectus, paragraph 4.3 states that the company, referring to Holdings, will operate as a holding company and intends utilizing the proceeds of this tenth offer to:-

[35] 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.

[36] 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.

[37] 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 ultimate borrower of the monies raised through the claims will the Zambezi Retail, the private

company. Here we have the debtor and creditor being substantially the same person. Exactly what questions respondent raised with regard to the projected purchase price remains a mystery and the purpose behind the unsecured loan also remain unclear. It is fair to conclude that respondent never read the prospectus for if he read and understood prospectus No. 10, he would have appreciated the risk complainant was facing.

[38] 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. 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. My comments in the first Barnes determination[2] are equally relevant here.

[39] On respondent's own version, he was negligent. It was his responsibility to conduct due diligence and not rely on what is available publicly. A mere reading of the prospectus alone would have led to complainant investing her money elsewhere. It is clear by now that respondent lacked resources to evaluate an investment of this nature.

[40] It is respondent's case to this Office that the investment was not high risk. It is evident from the prospectus which he supposedly discussed with complainant that this was in fact a high risk investment. The statement made by

[2] Supra paragraph 38 (iv)

respondent that complainant knew how financial markets work and appeared knowledgeable based on the questions she asked, must be questioned, given that respondent himself had superficial knowledge of the product. If respondent did not understand the product he was selling he could not have been in a position to disclose any of the material aspect of the product to complainant. Complainant needed to know that she is in this high risk investment for a long term.

Findings

a) I am satisfied that respondent failed in his duty to comply with section 8 (1) (d), given that the transaction involving the Zambezi investment was a replacement.

b) Respondent further failed to disclose the material aspect of liquidity regarding the investment in Sharemax Zambezi. On the contrary, the facts support complainant's version that her funds were going to be available within one year.

c) Respondent failed to disclose the risk inherent in the Sharemax Zambezi investment.

d) Respondent's insistence that the investment was not high risk is untenable.

e) Respondent also failed to make accurate disclosures to complainant as required by the Code regarding how the return was to be paid;

f) Respondent failed to disclose costs in respect of the investment in Zambezi.

g) Respondent failed to appropriately advise complainant in that he failed to apply his mind as to how much risk complainant could tolerate, given her circumstances. He failed to recommend a product commensurate with complainant's risk tolerance to address her need for post retirement income.

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

i) 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. None of the issues ventilated in this determination have anything to do with that. These are matters of compliance with the Code. Respondent's contention in this regard must fail.

j) 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. On respondent's own version the advice provided was in contravention of the Code. In this regard, in paragraph 15 of his response to this Office respondent recommended the product based on his discussions with complainant about the collapsing American and European markets and the excellent return of 12 % return on the product. Respondent was obliged to recommend a product commensurate with complainant's risk tolerance and circumstances and not ignore the negative aspects of the product. This is precisely the sales pitch that the Code seeks to protect consumers from.

k) Respondent failed to provide evidence to support his contention that complainant took active part in her investment portfolio. This claim therefore must be rejected.

l) Respondent has failed to point out the material disputes of fact. What is clear in this complaint is respondent's failure to abide by the Code. None of the documents submitted by respondent to this Office support his claims to have complied with the Code in so far as the disclosures of risk, liquidity and costs are concerned. Respondent's contention in this regard also falls to be rejected. It is clear that there is no material dispute of fact in the matter.

Quantum

[41] Complainant invested R780 000 in the Sharemax Zambezi. According to complainant her capital was due to be paid during November 2009. The balance of probabilities favour complainant's version. It is now two years since the due date of payment. Complainant has also not been paid any income since September 2009. All of these, support complainant's contention that she has lost her capital of R780 000.00. I therefore intend to make an order in the amount of R780 000.

G. ACCOUNTABILITY

[42] 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:-

[43] 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.

[44] 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.

[45] 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.

[46] 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;

(iii) 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.

H. ORDER

In the premises the following order is made:

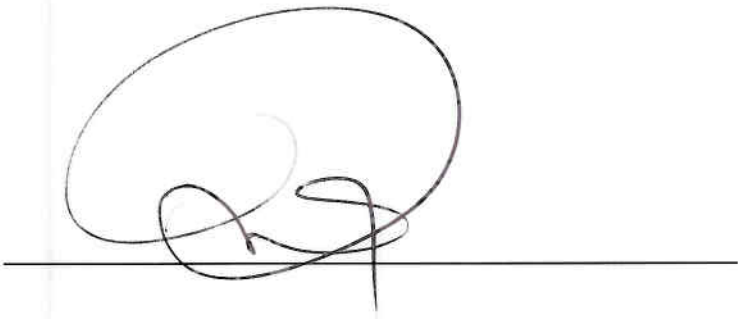
1. The complaint is upheld;

2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R780 000,00;

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

4. 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 29th OF NOVEMBER 2011.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS