IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 02955/11-12/ KZN 1

In the case between:

CAROL CHARLOTTE VAN ZYL **Complainant**

(In her capacity as executrix of estate late Maria Catherina Van Wyk, in terms of the letters of executorship issued by the Master of the High Court dated 22 February 2017)

And

JOHANNES CHRISTIAN MOSTERT **Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO 37 OF 2002 (the Act)

A. INTRODUCTION

[1] The complaint in this matter arises from failed investments made by complainant in public property syndication schemes known as Sharemax The Villa Retail Park Holdings Ltd[1] (The Villa) and Carletonville Centre Holdings Ltd[2] (Carletonville), following advice from respondent. The two schemes were promoted by Sharemax Investments (Pty) Ltd, (hereinafter referred to as Sharemax). The promised returns

1 Registration number 2008/017207/06

2 Registration number 2005/037881/06

did not materialise and complainant's capital has also not been returned, this notwithstanding that both investments have reached their term. Complainant was of the view that she had lost her capital and lodged the present complaint, requesting that respondent be ordered to repay her capital.

B. THE PARTIES

[2] Complainant is Carol Charlotte van Zyl, in her capacity as executrix of Estate Late Maria Catherina Van Wyk, in terms of letters of executorship issued by the Master of the High Court dated 22 February 2017.

[3] Respondent is Johannes Christiaan Mostert, an adult male and sole proprietor who trades under the name and style of Medsure Brokers and whose business address is noted in the regulator's records as 97 Padfield Road, Padfield Park, Pinetown, KwaZulu - Natal. Respondent is an Authorised Financial Services Provider, (FSP) as provided for in the FAIS Act, with license number 5553. The license has been in force since 22 December 2004.

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

C. ABOUT SHAREMAX

[5] Sharemax, a private company known as a promoter of public property syndication schemes, (property syndication schemes) was incorporated in 1998 and was based in Pretoria. Sharemax further managed and provided administration services in connection with the immovable properties associated with Sharemax. Although very little was highlighted about its role as a provider of secretarial services and manager of investor funds, the last two functions were at the heart of

the Sharemax' operation. Essentially, Sharemax controlled most, if not all, the companies that fell within its group.

[6] Sharemax was granted a license as an FSP, in terms of section 8 of the FAIS Act on 13 September 2005. In terms of the licence, Sharemax was authorised as a Category 1 FSP to render advisory and intermediary services with regard to securities and instruments, shares (1.8) and debentures (1.10).

[7] From time to time, Sharemax promoted and issued prospectuses regarding various property syndication schemes. The prospectuses were purportedly registered with the Registrar of Companies in terms of section 155 of the Companies Act 61 of 1973, as amended. For the purposes of this complaint, only two schemes are relevant, namely The Villa and Carletonville.

[8] The leading lights of Sharemax at the time were Johannes Willem Botha, Andre Daniël Brand, Diederick Rudolph Koekemoer, and Dominique Haese, all described in the two prospectuses as businessmen and business woman. From the detail provided by the prospectuses, the directors of the promoter (Sharemax), the Villa and Carletonville were one and the same.

[9] Although both prospectuses made provision for the election of a new board by the shareholders of the individual companies, at the company's first annual general meeting after registration of the prospectuses, the promoter reserved the right to have three directors on the board[3] of both entities for the first five years. The

---

[3] Paragraph 3.3 of the Villa prospectus and paragraph 3.3 of the Carletonville prospectus

number of directors could not be less than three and not more than five, according to the prospectus.

[10] There is no evidence that there was ever an independent board of directors, nor audit, risk and remuneration committees in place within the Sharemax group's business.

[11] During the course of 2010, news of Sharemax's financial troubles surfaced. It was said that Sharemax was experiencing difficulties in paying income to investors.

[12] At around the same time, news that the South African Reserve Bank (SARB) was conducting an inspection followed. Not long thereafter the Registrar of Banks concluded that the Sharemax business model offended the Bank's Act. Directives were issued to Sharemax for the repayment of funds collected from individual investors in September 2010.

[13] Clearly, the funds were not repaid to the investors and during 2012 the court sanctioned schemes of arrangement[4] in respect of several schemes within the Sharemax group. These schemes were taken over by an entity known as Nova Property Group Holdings Limited 2011/003964/06 (Nova). Sharemax investors were issued with either debentures or shares in Nova. Nevertheless, Sharemax's FSP license lapsed in October 2012.

D. INFRACTIONS OF NOTICE 459

---

4 As contemplated by section 311 of the Companies Act 61 of 1973

[14] For reasons that will emerge later in this determination, it is necessary to make a few comments with regards to The Villa investment[5].

[15] On 30 March 2006 the Minister of Trade and Industry, acting in terms of section 12 (6) of the Business Practices Act, published Notice 459 of 2006 (Notice 459) in Government Gazette No 28690. The notice came into effect on 30 March 2006.

[16] In terms of section 2 (b) of Notice 459 (Annexure A) which deals with **investor protection,** funds shall **only** be withdrawn from the trust account **in the event of registration of transfer of the property into the syndication vehicle**; or underwriting by an underwriter whose details shall be disclosed; or repayment to an investor in the event of the syndication not proceeding.

[17] The prospectus issued by the promoter uses the words 'The Villa Holdings' or the 'Company' when referring to the public entity, (The Villa Retail Park Holdings Limited), into which investors' funds were paid, and The Villa when it refers to The Villa (Pty) Ltd, (the entity that would eventually own the immovable property after transfer). For ease of reading, The Villa in this determination refers to the public company to distinguish it from The Villa (Pty) Ltd.

[18] The Villa prospectus[6] offered units (to prospective investors) comprising of linked units consisting of one ordinary par value share and one unsecured floating rate claim, linked together in a unit at R1000 per unit. In order to effect investments,

---

[5] Note: The Notice came into effect after the Carletonville product was purchased. Therefore, it does not apply to the Carletonville transaction.

[6] Prospectus 1 – opening date 2 February 2009 – 1 May 2009, applicable to this investment.

investors were directed to complete the relevant application form and deposit funds into the trust account of attorneys, Weavind and Weavind Inc. The prospectus[7] further conveyed, that investor funds will be retained in the attorneys' trust account in terms of section 78 (2A) of the Attorneys Act (Act 53 of 1979), until registration of transfer into the name of the syndication vehicle. In this respect the prospectus complied with Notice 459.

[19] In violation of the notice however, the same prospectus[8] made provision for the withdrawal of funds from the trust account prior to registration of transfer to fund, *inter alia*, commissions, directors' travelling, office expenses and other expenses[9]. The prospectus further made provision for the advancement of large amounts of money as loans to the developer of the land, Capicol 1 (Pty) Ltd.

[20] The relevant paragraphs are quoted below:

20.1 Paragraph 4.3

'The Company will operate as a holding company and intends utilising the proceeds of the offer to:

4.3.1 *pay part of the Purchase Price being R11 192 763……. in respect of the entire shareholding in The Villa purchased from Sharemax for an amount equal to 17,77%..... of the Purchase Price to be paid by The Villa* ***for the business referred to in 4.3.2.1 below;*** *and*

7 Paragraph 19.10 The Villa prospectus 1

8 Paragraph 4.3.1

9 The application form used to effect this investment notes that upon payment of the amount into the Attorneys' trust account, Sharemax will deduct 10% of the funds to pay marketing costs.

4.3.2. ***to advance*** *loan funding in the amount of R50 000 000….. to The Villa for the purposes of -*

4.3.2.1 *paying the Purchase Price which is to be paid to purchase the Immovable Property from Capicol 1 (Pty) Ltd (2007/014113/07) for a projected amount of R2 900 000 000…… (excluding VAT) which purchase will be a purchase of an income generating undertaking as a going concern. The expected date of transfer is 1 March 2011. The actual Purchase Price will only be calculated and adjusted thirty days after the Occupation Date, once the income stream (rental) has been determined. The income generating business comprising inter alia, the Immovable Property was purchased for an amount equal to an agreed cap rate of 11.60% per annum return on investment as at date of transfer of the Immovable Property in the name of The Villa. It has further been agreed that in the event of the actual income generated by the business as at the said date being more or less than as anticipated, the Purchase Price would be adjusted to equate the agreed cape rate of 11.60%.*

4.3.3 *Creating a cashflow shortfall fund for the Company in the amount of R1 807 237…..'* (Own emphasis).

20.2 Paragraph 4.8.1 reminds investors that '*All monies received from investors of the Company will be deposited in a trust account with the Attorneys who shall control the withdrawal of funds from that trust account.*'

20.3 Paragraph 4.17 states: '*The immovable property has been purchased* ***subject to the suspensive conditions*** *that:*

4.17.1 by no later than 60 days from date of signature the members of the Seller have passed all resolutions as may be required to approve ***and implement the sale transaction as envisaged in the Sale of Business Agreement****, including such special resolutions as may be required in terms of section 228 of the Companies Act, and such special resolution shall have been registered with the Companies and Intellectual Property Registration Office.*' (Own emphasis).

20.4 Paragraph 5.9 of the prospectus details the expenditure to be paid from the amount of R11 192 763. The expenditure comprises amongst others advertising, marketing, office expenditure, travelling and accommodation.

[21] The Sale of Business Agreement, (SBA) was not attached to the prospectus but was, according to the prospectus, made available at the promoter's business premises. The SBA reveals a pyramid scheme (which shall be further discussed later in this determination).

E. THE COMPLAINT

[22] During March 2006, complainant made her first investment in Carletonville in the amount of R200 000. At the time, complainant required an investment that would

provide her income which was higher than what the banks offered. It is clear from respondent's records that he compared a Momentum Income Plan with the Carletonville product. Following respondent's advice, complainant decided to invest in Carletonville. Perhaps one should state that it is not the idea of comparing but what was compared between the two products that is startling about respondent's conduct. The term of this investment was five years.

[23] Complainant made a further investment in February 2009 in the amount of R70 000, in The Villa. Like the Carletonville transaction, the purpose in concluding this transaction was to generate monthly income. The term of this investment was five years.

[24] During October 2010, complainant informed respondent that she had not received interest from either investment. In turn, respondent advised that Sharemax was experiencing problems. Upon maturity of the Carletonville investment in March 2011, complainant was not paid her capital. Likewise, nothing has been paid of the capital invested in The Villa.

[25] Complainant states that she had warned respondent prior to making the first investment that she could not afford to lose money, as she had lost money in the Krion[10] investment scheme. Respondent is alleged to have advised that Sharemax was a good investment and complainant had nothing to worry about.

---

10 An illegal Ponzi-type money multiplication scheme that operated between 1998 and 2002 wherein investors lost approximately R900 million when it collapsed in 2002.

[26] Complainant further claims she was not advised that her funds were invested in property syndication, nor was she advised that the investments were high risk. Complainant claims she was only advised that the Carletonville investment would mature in March 2011 and assured of the safety of her funds in respect of both investments.

F. RELIEF SOUGHT

[27] Complainant seeks payment from respondent in the amount of R270 000. The basis of complainant's claim against respondent is the latter's failure to render financial services in line with the FAIS Act, (the Act) and the General Code of Conduct for Authorised Financial Services Providers and Representatives, (the Code), which includes respondent's failure to appropriately advise complainant and disclose the risk involved in the Sharemax investments.

G. RESPONDENT'S RESPONSE

[28] On 16 August 2011, in compliance with Rule 6 (b) of the Rules on Proceedings of the Office of the Ombud, the Office referred the complaint to respondent, advising respondent to resolve the complaint with his client.

[29] In response, respondent filed a 60 page document, the contents of which failed to address the substance of the complaint. Instead of dealing with the merits of the dispute, respondent brought an application, supported by a lengthy declaration, for the following relief:

29.1 That this Office should find, in terms of section 27 (3) (c) of the Act, that it is more appropriate to refer the complaint to a court and that this Office decline to entertain the complaint;

29.2 In the alternative, this Office should afford the respondents a "formal hearing", which must include the exchange of pleadings, requests for further particulars, discovery, oral evidence from experts, and oral evidence from witnesses who must be subject to cross-examination, a public hearing and legal argument before determination.

[30] Respondent was effectively requesting that this Office afford them an adversarial procedure as it is applied in court. In plain language, he wanted a trial.

[31] The supporting affidavit begins with respondent stating the following:

"I have read the complaint of Mrs van Wyk against me dated 4 August 2011. I do not deal any further with the particulars of the complaint in this declaration and I reserve the right to do so if and when it may become necessary to do so."

[32] Respondent blatantly and contrary to the provisions of the Act, refused to deal with the substance of the complaint. The declaration contains nothing more than legal submissions in support of the motion. Respondent did not even present a statement dealing with their defence in the event their motion was refused.

[33] The declaration contains legal argument that:

33.1 the processes of this Office were unconstitutional;

33.2 the procedure in this Office was inappropriate for this case;

33.3 the process in this Office "lacks transparency";

33.4 dealt with whether this Office is "a forum or a tribunal"; and

33.5 this Office is not independent and is biased.

[34] This declaration and motion was submitted to this Office before the judgement of the High Court in the Deeb Risk matter[11]. The High Court dismissed a similar application, based on the same legal submissions in this declaration. Incidentally, the attorney for the applicant in the Deeb Risk case was the respondents' attorney herein. Accordingly, and for reasons that appear in the Deeb Risk judgement, respondent's motion is dismissed.

[35] After the Deeb Risk judgement, this Office considered it only fair to deliver a further notice in terms of section 27 (4) of the Act, to respondents on 30 June 2015, inviting them to respond to the complaint. The notice spelt out the issues for response and they included, *inter alia*, the following:

"*Your attention is specifically drawn to the following facts and related questions, which require your consideration and response:*

11.1 The complaint related to an investment in The Villa Retail Park, a property syndication scheme promoted by Sharemax Investments (Pty) Ltd.

11.2 The prospectuses of both The Villa Retail Park Holdings as well as Zambezi Retail Park Holdings[12] declare that the respective entities have never traded prior to the registration of the prospectus, have not made any profit whatsoever and are still under construction.

---

[11] Case no: 38791/2011, Gauteng Provincial Division – Baqwa J

[12] Another Sharemax syndication which was promoted during this period

11.3 In the circumstances how did you expect the income to be paid, other than out of investors' money?

11.4 The prospectuses refer to the investment as being in an unsecured subordinated interest rate acknowledgement of debt, linked to a share; which share was in an entity still under construction. Additionally, the registrar of companies within the prospectus states 'that the shares on offer are unlisted and should be considered risk capital investment'.

11.5 Given the preceding paragraph please advise as to why you considered the investment to be anything less than an extremely risky venture, without any substance to its guarantee on interest payments?

11.6 Was your client properly apprised of these risks? Please provide evidence to this effect.

11.7 What information did you rely on to conclude that this investment is appropriate to your client's risk profile and financial needs? In this regard your attention is drawn to the provisions of section 8 and 9 of the General Code. (Note: the record we are looking for must have been compiled at the time of advising your client. A post facto account will not be accepted.)"

(My emphasis).

[36] Respondents' attorney filed a further declaration in response to the second notice. Again, this document was unnecessarily voluminous (66 pages), most of which was unhelpful. Notwithstanding the judgement in Deeb Risk, respondents' attorney persisted in challenging the processes and procedures of this Office and continued to request a hearing. In this instance, respondent relies on a ruling of the Board of

Appeal in the case of *GEJ Siegrist v CJ Botha and others*[13] to support his claim that this Office does not observe the principles pertaining to procedural fairness.

[37] This Office accepts the decision made by Justice Harms in the Siegrist appeal, including the learned Justice' statement about procedural fairness with reference to PAJA. However, the learned judge made no general statement to the effect that the processes in this Office, in dealing with a complaint against FSPs, was procedurally unfair. Nor did the learned judge find that the procedure in this Office generally offend the *audi* rule. There is equally no binding authority which compels this Office to hold adversarial hearings every time a party alleges that there is a dispute of fact. There is no material dispute of fact in this case that warrants the holding of an adversarial hearing. Respondent repeatedly alleges that there is a substantial dispute of fact; except that he does not say exactly what the disputes are. At this point it might be apposite to refer to the remarks of the learned Southwood AJA[14] , in relation to dispute of fact:

[38] 'In my view the proper approach to the situation is that outlined in *Wightman t/a JW Construction v Headfour (Pty) Ltd & another*[15]:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other

---

13 FAIS 00039/11-12 GP 1

14 Dulce Vita CC v van Coller and Others (192/12) [2013], para 29

15 2008 (3) SA 371 (SCA) para 13

way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

Those disputes that have emerged regarding the nature of the advice given by respondent to complainant can be dealt with without a reference to a hearing. After all, this is the reason the legislature saw it necessary to provide for a record of

advice in section 9 of the Code. The request for a hearing is merely a strategy to cause delay.

[39] A further allegation made by respondent is that this Office is not considered a tribunal, lacks transparency, and operates like "police". These claims were tested and appropriately dismissed by the Appeals Board in the matter of *ACS Financial Management & Snyman v Coetzee*[16].

[40] In light of the above, I decline the application for a hearing.

H. DETERMINATION AND REASONS

[41] The following are issues for determination:

41.1 Whether respondent in rendering financial services to complainant had violated the provisions of the FAIS Act and the General Code of Conduct, (the Code).

41.2 In the event it is found that respondent had violated the provisions of the FAIS Act and the Code, whether such conduct caused the loss now complained of; and

41.3 Quantum

[42] In his response, respondent relied on the following:

---

16 CASE FAB 1/2016

42.1 the application forms signed by complainant (These were used to show that complainant acknowledged that the risks involved in the investment were explained to her);

42.2 the Sharemax products were appropriate for complainant as she required a better monthly income;

42.3 the contents of the prospectuses for The Villa and Carletonville; (as a reference point to answer all the questions quoted in paragraph 35 above).

42.4 the opinions of three experts, (The opinions are used to explain that the Sharemax business model was sound and viable).

[43] Before I deal with respondent's declaration, it is necessary to state what was expected from respondent, bearing in mind the issues. In terms of the Code, read with the Act, the duty rests on the FSP to appropriately advise his client and in so doing, disclose the material aspects of the transaction, in order for complainant to make an informed decision. It goes without saying that the disclosure and the advice must take into account the client's reasonably assumed level of familiarity and understanding of financial products. The provider however, is not relieved from his duty to act in the interests of the client and to recommend a product that is commensurate with the client's circumstances. A claim has been made by complainant that not only were the prospectuses not explained to her, she was not even made aware that she was investing in property syndication investments.

[44] In responding to the complaint, respondent was required to explain:

44.1 How, at the time of advising complainant, he satisfied himself that the Villa was able to pay the promised monthly returns, given that it had not traded, and had made no profits of its own and the syndicated property was still under construction.

44.2 Whether he considered that the returns were being paid out of the investors' own funds.

44.3 Why he (respondent) did not regard the Sharemax investments as highly risky; and

44.4 Why and on what basis respondent concluded that the products were appropriate for complainant, bearing in mind the latter's financial circumstances and her capacity and tolerance for risk.

[45] Respondent had to answer these questions using recorded information (records of advice) dealing with complainant's circumstances at the time of giving advice, not an *ex post facto* account. Respondent, however, objected to these questions, stating that complainant did not raise them and more particularly, complainant does not deny receiving the prospectuses. Respondent indicated that all the questions asked in the letter of 30 June 2015, were <u>fully dealt with in the respective prospectuses</u>, the content of which was discussed with complainant.

[46] Respondent, in other words, had satisfied himself that the investments were viable, from reading the prospectuses. This then means that he actually understood the

prospectuses and had carried out due diligence on the investments and the companies involved. I will demonstrate in a moment that this was not the case.

[47] Having read respondent's lengthy response, the following represent his main points:

47.1 The risks were explained to complainant as confirmed by her signature in the contracts, disclosure documents and access to the prospectuses.

47.2 The products (property syndication products) were appropriate as complainant wanted a higher monthly income than what the banks offered.

47.3 The prospectus evidence of Sharemax's good record and the viability of business model.

47.4 The prospectus provided an explanation as to how Sharemax was going to pay investors returns.

[48] Respondent also relies on the "opinions" of three experts; viz, Swanepoel, Schussler and Cohen in respect of the Sharemax funding models.

[49] Respondent however, did not include the actual opinions or reports from the experts, if they exist at all. There is also no explanation as to why these opinions were withheld. On this basis, respondent presents a hearsay account of what the experts said about the Sharemax's business model. As a result, I am unable to make a proper assessment of these "opinions". This is ironic, as respondent pleads for an adversarial hearing where he can lead evidence of expert witnesses.

[50] In the premises, reference to these "opinions" is unhelpful. Nonetheless, I will show that the experts' version, as related by respondent, does not support respondent's version.

How Sharemax paid the returns (This is inextricably linked to the violations of Notice 459)

The Villa investment

[51] For the purposes of this analysis, I deal with the two investments individually. I further note that Notice 459 does not apply to the Carletonville investment.

[52] An important question to be answered by respondent is how he satisfied himself, at the time of advising complainant, that Sharemax was capable of paying the promised returns. The issue is one of viability, given the high returns, which at the time were out of kilter with the returns offered by markets.

[53] Respondent's version is that he satisfied himself by reading The Villa prospectus. Respondent suggests that investors were paid from interest earned on the call account in the attorney's trust account. Respondent however, failed to explain how this was possible, bearing in mind the rate of interest paid by the bank on this account. The rate during August 2009 was between 4 - 5%[17]. This is entirely inadequate to cover payments to investors. One must also bear in mind that Sharemax paid 6% commission (on the full capital invested) to the brokers within two weeks of payment of the funds by investors, deposited into the attorney's trust account. Sharemax also took funds to cover office expenses, travelling, legal fees

---

17 http://www.fidfund.co.za/banking-options/credit-interest-rate-history/ (accessed on 16 November 2016)

and fees for due diligence. (Refer to paragraph 20.4 of this determination.) Yet, they paid the investors interest ranging between 11.5 % and 12% - from the interest earned on call account? This was simply impossible. If respondent did not understand this, then how did he conclude that the investment was sound and what possible explanation did he give to complainant?

[54] An even more interesting explanation of how Sharemax managed to pay the interest to investors, according to respondent, is to be found in the Sale of Business Agreement between The Villa and Capicol, which I discuss immediately here below.

Sale of business agreement

[55] The prospectus refers to a Sale of Business Agreement" (hereinafter referred to as the SBA or simply the agreement) concluded between The Villa (Pty) Ltd and the developer, Capicol. Two types of payments are dealt with in the agreement, viz, payments to the developer and an agent, Brandberg Konsultante (Pty) Ltd (Brandberg). Respondent refrained from dealing with this agreement in his response, nor did he make any statement about advising his client on its implications for her investment in The Villa.

Payments to Capicol

[56] According to the agreement, investors' funds were moved from The Villa to The Villa (Pty) Ltd and advanced to the developer of the shopping mall. The payments were made before transfer of the immovable property and therefore were in

violation of the Notice. At the time of releasing the prospectus of The Villa[18], Sharemax published that an amount in excess of R1.2 billion had already been advanced to the developer, in line with this agreement. A brief analysis of the business agreement reveals:

56.1 there was no security for the loan; this is clear from reading the prospectus and the agreement;

56.2 bearing in mind that the prospectus states that the asset was acquired as a going concern, investors were deceived as the building was still at its early stages of development;

56.3 at the time the funds were advanced to the developer the immovable property was still registered in the name of the developer;

56.4 the developer paid interest of 14% from which Sharemax took 2 % and paid the remaining 12% to the investors of the Villa;

56.5 there is no evidence that the developer had independent funds from which it was paying interest. Besides, if the developer had the financial standing and worthiness to borrow such large sums of money, at 14 % per annum, it would have gone to mainstream commercial sources;

56.6 the agreement is void of detail relating to the assessment of the developer's credit worthiness;

---

18 This prospectus opened on 2 February 2009

56.7 no detail is provided to demonstrate that the directors of the Villa had any concern for violating Notice 459;

56.8 the conclusion is inescapable that the interest paid to investors was from their own capital.

Payments to Brandberg

[57] An entity known as Brandberg also received advance commission, calculated at 3% of the purchase price of R2 900 000 000. No reasons are provided in the agreement for advancing the commission.

[58] The entity was supposedly the effective cause of the sale but no valid business case is made as to why commission had to be advanced in the light of the risk to investors.

[59] A cursory reading of the SBA reveals a pyramid scheme.

[60] The prospectus of The Villa was patently in breach of Notice 459 and was littered with conflicting and totally irreconcilable statements to obfuscate the truth from prospective investors. See in this regard paragraph 19.10 of the prospectus and the reference to investor funds, which were meant to be retained in an attorneys' trust account in terms of section 78 (2A) of the Attorneys Act, until registration of transfer. The paragraph is irreconcilable with paragraph 4.8.1 of the prospectus. There is no satisfactory explanation of how Sharemax paid income to investors. The only reasonable and valid conclusion from the analysis of the prospectus is that investors were paid income from their own money. The investment was not

only high risk, it made no business sense and the disclosures contained in the prospectus were nothing short of misleading. The shenanigans were fueled by the lack of proper governance arrangements and lack of oversight. (See below discussion relating to the Carletonville prospectus.)

[61] At best, respondent failed to read the SBA prior to advising complainant, which makes respondent negligent. At worst, and in the event respondent had read and understood the SBA and still advised complainant to invest in the Villa, respondent was reckless.

[62] On a balance of probabilities, had respondent explained to complainant the true implications of the SBA, the violation of Notice 459 and the implications for her investment, complainant would not have invested her funds into Sharemax, which leads me to the conclusion that complainant was denied the opportunity to make an informed decision about the Sharemax investment.

[63] Respondent submits that this Office does not see "the commercial reality" in the contents of the prospectus. The less said of this contention, the better.

[64] Respondent fails to explain why The Zambezi also failed notwithstanding that Sharemax had actually built a shopping center. He also does not explain why the Carletonville investment did not pay out when it matured in 2011. The truth is, the fall was foreseeable from a plain reading of the prospectus.

The Carletonville Centre prospectus

[65] This investment was concluded prior to the commencement of Notice 459. Having said the poor governance practices identified in this discussion apply equally to the Villa investment; each one of the flaws were sufficient to have stopped respondent in his tracks and direct his client elsewhere with her money.

[66] I note that respondent had read the prospectus and discussed it with his client. Upon reading the prospectus, the following can be observed:

66.1 The directors of Carletonville Centre Holdings Limited, (Carletonville or the Company), (into which complainant's investment was paid), were the same as the directors of Sharemax, and Carletonville Centre Investments (Pty) Ltd, (Carleton (Pty) Ltd), (the company that owned the property).

66.2 In addition to being the promoter, Sharemax was the property manager, company secretary, and manager of investor funds. An interesting point to note in respondent's response, is his failure to recognize the obvious conflict of interest that the directors would be faced with as they went about their daily duties. Respondent, for example, had no clue of the costs claimed by Sharemax for rendering the services mentioned in this paragraph. This aspect of the investment alone posed high risk to investors. A basic knowledge of corporate governance[19] would have alerted respondent to the inherent risks.

[19] Reference is drawn to the King II report where one of the seven characteristics of good corporate governance is independence. It is explained as: *"Independence is the extent to which mechanisms have been put in place to minimise or avoid potential conflicts of interest that may exist, such as dominance by a strong chief executive or large shareowner. These mechanisms range from the composition of the board, to appointments to committees of the board, and external parties such as the auditors. The decisions made, and internal processes established, should be objective and not allow for undue influences"*.

66.3 There is no evidence (and this was patently clear from the prospectuses) that an independent board of directors ever existed in the entire group of Sharemax entities at the time, nor were there independent audit, risk and remuneration committees. With no evidence of independent oversight, it is fair to conclude that investors would have no protection whatsoever and were at the mercy of executive directors who were, for all intents and purposes, accountable only to themselves. The executive directors were therefore at liberty to spend investors' monies and pay themselves as they pleased, for they were only accountable to themselves. It is acceptable that the existence of a board does not mean absolute protection for investors. Having said that, verifying the depth carried by a board is still part of proper due diligence.

66.4 Flowing from the lack of oversight arrangements by means of an independent board of directors, respondent did not know whether there were any internal controls, and the extent to which such controls would support reliance on financial statements produced by the entities within the Sharemax stable. It is evident from respondent's version that he had not seen a set of audited financial statements of any of the entities within the Sharemax stable. Respondent therefore could not know whether the assets of the entities within Sharemax were properly recorded, and expenses accurately accounted for, so as not to inflate profits or understate losses.

66.5 Each share sold comprised an unsecured floating rate claim. The prospectus states that the interest payable on the claim component of the unit, **will be determined from time to time by the directors**[20]. Notwithstanding respondent's claim that complainant stood to realise a higher interest rate, there is no evidence that respondent explained to complainant that the so called high interest rate could be zero percent, which could be decided by the directors overnight. Complainant's funds were invested in a product where the interest rate depended on the sole discretion of conflicted directors. Despite this, respondent still maintains that the investment was not high risk and was suitable for complainant.

66.6 Paragraph 4.2 of the prospectus notes that the company had never traded prior to its registration and has not made any profit whatsoever. The question that should have immediately arisen in respondent's mind is the source of the income from which investors will be paid.

66.7 From the projected financials in the prospectus[21], it was evident that there would be significant shortfalls. Respondent does not explain how the entity intended to make up these shortfalls, and why, notwithstanding this information, he went ahead with promoting the investment.

---

20 See paragraph 9.3 of the Carletonville prospectus

21 Paragraph 5.12 of the prospectus

66.8 The prospectus[22] further states that the company intended to utilise the proceeds of the offer to:

66.8.1 pay the purchase price in respect of the entire shareholding in Carletonville Centre, purchased from Sharemax for an amount of R9 054 808; and

66.8.2 advance loan funding in the amount of R28 450 000 to Carletonville Centre for the purpose of purchasing the immovable property from Henbase No 1052 (Pty) Ltd[23] which purchase will be the purchase of an income generating undertaking as a going concern. Furthermore, a reserve fund would be created to be used as working capital in the amount of R250 000.

66.9 The amount of R9 054 808 was payable by the Company to Sharemax[24] to defray expenses as set out in the prospectus[25]. These included advertising, printing, marketing costs, and amongst others, travel and accommodation. The same amount is shown in the projected financials as "impairment of goodwill[26]".

66.10 The same prospectus notes that the claims are only repayable in the event of the winding-up of the company, or disposal of the immovable property,

---

22 See paragraph 4.3 in this regard

23 Registration number 1993/07578/07

24 Refer to paragraph 5.9 of the prospectus

25 Paragraph 5.9

26 An asset is impaired when its carrying value exceeds the recoverable amount.

provided that a period of a least 12 months has lapsed since the date of issue of the claims.

66.11 Paragraph 5.7.3 of the prospectus states the following:

"payment of an amount of R895 192 (Eight hundred and ninety five thousand one hundred and ninety two rand) being 2.33% of the said capital in ***a reserve fund to fund cashflow shortfalls on interest payments to investors. Investors expressed a need to earn higher yields on their investment initially by sacrificing on the escalations of their interest income in the years thereafter.*** *The directors estimate the shortfalls which will be funded from this cash reserve to be as follows...... "*

This paragraph simply informs investors that the attractive interest was made possible because a portion of their capital was used to fund the income. This goes to the heart of the viability of the scheme. There is also no indication that it was explained to complainant that the interest initially offered would not be maintained in the years to come.

66.12 The same prospectus in paragraph 5.10 states that upon payment of the purchase price into the attorneys' trust account, an amount equal to 10% would be released to Sharemax to pay commissions.

[67] It is clear from respondent's version that none of these financial red flags were ever dealt with when he advised complainant to invest with Sharemax. Respondent did not explain his reasons why he thought a high-risk product like Sharemax was

appropriate for a pensioner who required capital security, when clearly this is not the case.

[68] The mere fact that respondent was happy to market this investment, when he knew he did not have the skill to interrogate the prospectus and relevant documents, is sufficient to conclude he was reckless.

Risk

[69] Respondent avers that there was risk in the investment. However, he did not consider the risk to be high after reading the prospectus. He supports his contention by pointing out that there was a mortgage bond in favour of Sharemax "*which secures the investment against the underlying property..[....]...This constitutes "real" security, being the same type of security taken by banks when lending funds to a property developer.*" This is entirely misleading and not supported by any facts.

[70] To begin with, The Villa prospectus clearly stated that there was no registered bond in place (it was in the process of being registered). Why respondent saw this as reducing risk is not explained. Respondent also failed to deal with the valuation of the property compared to the debt intended to be secured. Remember that respondent had never seen a set of audited financial statements for any entity from the Sharemax group of companies. It is fair to conclude that respondent could not verify a single detail from any independent source. Even if there was a registered bond over the property, it was quite useless to investors when reference is made to the SBA.

[71] Respondent then states that the high court holds divergent views from this Office regarding risk relating to property syndication companies. To support this startling statement, respondent refers to a judgement in the case of *Anne-Marie de Lange vs Zephan (Pty) Ltd and others*[27]. This judgement certainly does not support respondent's submission. The judgment concerns a class action brought by investors who lost their funds in a property syndication which was marketed as Picvest. Respondent quotes from the judgement to make the submission that bonds and buy-back agreements render this investment risk free. The learned Judge said no such thing; the learned Judge was quoted out of context.

[72] The full quotation is as follows:

"The plaintiffs [investors] purchased the shares because of the security of the buy-back agreements. That made the investment ostensibly risk-free. The investors were made to believe that contracts in that form had in fact been signed. It is highly probable that such contracts had in fact been entered into, at least orally,"

[73] Respondent only quoted the first two sentences. His Lordship did not suggest that buy-back schemes and bonds made the investment risk free. His Lordship was referring to how investors were lured into making an investment in Picvest on the understanding that a buy-back contract was signed. In this case, the investors brought an application for summary judgement where the plaintiffs enforced the terms of the buy-back agreement. The defendants unsuccessfully defended the application on the basis that the buy-back agreement was of no force and effect.

[27] (82322/14) [2015] ZAGPPHC 540 (22 July 2015)

Judgement was granted in favour of the plaintiffs against the masterminds behind the scheme.

Warning of Risk

[74] Respondent relies on the prospectuses, as well as the documents signed by complainant to point out that the latter was in fact warned of the associated risks. Respondent's own understanding of the investment has already been undermined. He demonstrated no understanding of how to assess this type of investment. He missed out very basic details, such as the violations of Notice 459 on the part of the promoter.

[75] From a superficial calculation, the numbers would not add up to support the claim that investors' return was paid out of interest from the attorneys' trust account. He presented nothing about his due diligence to this Office. Respondent could not have advised complainant about the risk involved in this investment. He was simply in no position to do so. I add that the prospectus with the application forms and the disclosure documents run into well over a hundred pages of small writing. Complainant is clear that she did not read these documents but signed on the recommendation of respondent who assured her that the investments were safe. Bearing in mind that complainant was a pensioner with no knowledge of property syndications, it is improbable that she read these documents. In the event she did, she had no capacity to understand them. There was a duty on respondent to explain the investment and to satisfy himself that the investment was appropriate for the complainant.

[76] It is common cause that the complainant had previously lost her money in a scheme known as Krion, a Ponzi scheme, and had absolutely no capacity nor tolerance for risk. She stated as much to respondent. If she had understood the risks associated with this investment, she would not have invested a cent. On a balance of probabilities, she invested merely because she trusted respondent's advice.

[77] That complainant had no understanding of this investment is borne out by the contents of the client advice record kept by respondent. The following is of relevance:

77.1 Respondent confirms that complainant's personal circumstances and expectations were considered by him;

77.2 Respondent confirms that client's need was to make an investment and that her risk profile was "moderate";

77.3 Complainant sets out her needs as "steady growth and income" and "higher interest rate required than Bank Rates."

77.4 Under "Advice and Motivation" the following appears, in respondent's writing:

"*Compare Momentum income plan with Sharemax income plan.*

Momentum can have up to 40% equity exposure and can create capital loss as well as income reduction.

Sharemax is not linked to any equity and is exposed to the property market. Capital growth is projected at a 5% growth. Income growth is projected at a 4% growth."

77.5 The reason for selection is stated as follows: "*Income escalation and capital growth*".

[78] From a reading of this document, it becomes evident that complainant was a moderate investor, who wanted capital preservation and growth, coupled with better income. She had no tolerance for risk. On respondent's own understanding of Sharemax, this was not promised and as respondent correctly pointed out, Sharemax warned that there was a risk to capital. Respondent should therefore never have recommended Sharemax.

[79] However, a more serious concern appears from this advice record; that is, respondent deliberately created the false impression that the Momentum income plan was riskier than Sharemax. There is simply no basis to compare the two products. That respondent compared the two on the basis that he did, is sufficient justification to conclude that respondent misled complainant. Whether this was as a result of respondent's lack of depth or intent to mislead is not the issue; the fact remains that complainant was left with the understanding she was buying something akin to an insurer's income plan. By all accounts this was wrong. Not only was complainant dealing with an entity with no regulatory oversight in Sharemax, she had to contend with company specific risks, which include, to mention but a few:

79.1 violation of the law, (see in this regard the violation of the Notice 459);

79.2 disregard of good corporate governance prescripts, (see the contents of the business agreement, the payment of commissions to Brandberg for a property that had not yet been transferred to the purchaser, and the blatant disregard of the directors' fiduciary duties, as evidenced by the business agreement). In fact, the risks were far greater in the Sharemax product.

[80] Respondent misled his client into investing in Sharemax by falsely representing that the product offered by Momentum was riskier. Clearly, respondent wanted to sell the Sharemax product and had no intention of considering other products which would have been more suitable for complainant's needs. On this basis alone, respondent was in breach of the Code.

[81] The situation worsens if one considers that the prospectuses warns of a risk to capital and the possibility that income may not materialise, should the companies fail[28].

[82] On respondent's own version he states, "*At the time of the investment, I determined Mrs van Wyk's risk characterisation to be moderate.*" He then goes on to say that based on this classification, he determined that the Sharemax product was appropriate for complainant. I reject this, as the objective facts show that Sharemax was not for moderate investors. Respondent acted recklessly and was not concerned with the interests of his client. Respondent's focus was on the lucrative commission he stood to make from the product. I equally reject his version that Sharemax was the "*only investment available at the time*" to suit complainant's

[28] Please see in this regard the introductory paragraphs in both prospectuses

needs. Respondent made no effort to find products that were suitable to complainant.

[83] Complainant was a pensioner with no capacity to weigh up financial products and simply relied on respondent. Respondent knew this and took advantage of a vulnerable investor.

Ponzi scheme

[84] Respondent is adamant that The Villa was not a Ponzi scheme. The facts in this case speak for themselves.

[85] Respondent refers to certain "objective facts" about Sharemax which existed when the investment was made. Respondent however, still fails to deal with the violations of the law.

The Experts

[86] I am not told as to exactly what each experts' mandate was. I do not have their opinions and I have no access to the facts supplied to each expert by respondent. Respondent's attorney is aware of the fact that before an expert is relied on, a copy of his opinion must be provided.

[87] On respondent's version of what the experts said, it does not appear that the experts were called upon to deal with how The Villa funded payments to investors, FSPs and agents, where it did not appear to have any independent funding of its own and where it had no trading history. Nor do any of these experts appear to have been provided with the SBA. None of the experts deal with the transfer of

funds from the attorneys' trust account to The Villa to Capicol in violation of Notice 459. There is no explanation as to why the experts did not deal with this most crucial issue. In the absence of this explanation, these opinions are unhelpful to this Office.

[88] On respondent's account of the experts' opinions, none of them say anything about this investment being appropriate for complainant, bearing in mind her financial circumstances. Schussler, according to respondent, states that this investment was classified as "high risk". He also states that because of the risks, investors should not invest "more than 5% to 20% of their capital in an investment of this nature." What he is saying is that this investment was inappropriate for the complainant. Respondent is on record stating that this investment was appropriate for complainant's moderate risk profile.

[89] Schussler also suggests that the returns were high and therefore risk was justifiable. It was respondent's duty to take into account the particular profile and needs of the complainant. Respondent ought to have observed the basic principle that one should not risk capital for higher returns where the investor has absolutely no capacity to absorb such risk.

[90] Derek Cohen was presented with three determinations made by my Office involving Sharemax investments. He was requested to give an opinion on my treatment of Sharemax property syndications. This opinion is therefore irrelevant as Cohen is neither the Appeals Board nor the High Court. His opinion was not before me when I made these determinations and is of no use to me post determination.

J. CONCLUSION

[91] Based on the above, I find that respondent's conduct flouted section 2 of the Code.

[92] In addition, I find that respondent contravened the following sections of the Code: Section 3 (1) (a) (i) and (iii); section 7 (1) (a); section 8 (1) (a) and (c) and section 8 (2).

Consequences

[93] As a consequence of respondent's breach of the Code, he must be held liable for complainant's loss. Respondent submits that complainant suffered no loss as there are prospects post a section 311 scheme of arrangement, that she will receive her investment. Reference is made to the fact that the Zambezi Mall has now been let. This is irrelevant to investors in The Villa. The debentures underwritten by Nova have so far proved to be worthless. The fact remains that The Villa has no assets. Respondent is aware that there is zero probability of complainant recovering her capital from the investment, as many years have gone by without any investor in The Villa recovering any funds. There is absolutely no prospect that complainant will recover any of her funds from Carletonville.

[94] Respondent must be liable to pay to complainant the amount of R270 000.

K. CAUSATION

[95] On respondent's own version factual causation was established. But for his advice, complainant would not have invested in Sharemax and her capital would not have been lost.

[96] As for legal causation, this too has been established and in this regard, I refer to my determination in *ACS Financial Management vs Coetzee*[29].

L. THE ORDER

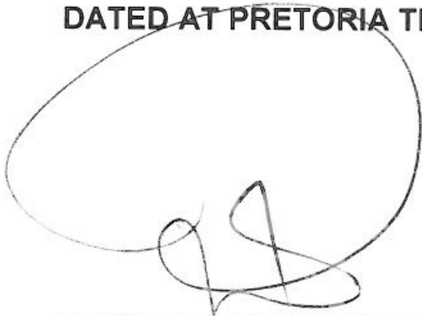
[97] In the premises, I make the following order:

1. The complaint is upheld.

2. Respondents are ordered to pay, jointly and severally, into the estate of the late Maria Catherina van Wyk, an amount of R270 000.

3. Interest on the amount of R270 000 at the rate of 10.25%, seven days from the date of this order to date of final payment.

DATED AT PRETORIA THIS THE 24th DAY OF MARCH 2017.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

[29] Case number FAIS 00943-10/11 GP 1, supplementary determination dated 29 June 2015