IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 05511/11-12/ GP 1

In the matter between

DORATHEA SOPHIA VAN ROOYEN	**Complainant**
and	
KOCH & KRUGER BROKERS CC	**First respondent**
DEON KRUGER	**Second respondent**
CAREL BARKHUIZEN	**Third respondent**

DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS ACT')

A. INTRODUCTION

[1] This determination follows a recommendation made in respect of section 27 (5) (c) of the Act on 16 November 2017. The recommendation is attached for ease of reference and must be read together with this determination.

B. THE PARTIES

[2] The complainant is Mrs Dorathea Sophia van Rooyen, an adult female pensioner whose particulars are on file with the Office.

[3] The first respondent is Koch & Kruger Brokers CC, a close corporation duly incorporated and registered with registration number 1992/007171/23. The regulator's records confirm the first respondent's principal place of business as Suite 305, Medforum Building, Secunda, 2302. The first respondent is an authorised financial services provider with licence number 11085. The licence has been active since 20 October 2004.

[4] The second respondent is Deon Kruger, an adult male representative of first respondent. The second respondent's address is the same as that of the first respondent.

[5] The third respondent is Carel Barkhuizen, an adult male and key individual of the first respondent. The third respondent's address is the same as that of the first respondent.

[6] At all materials times, second and third respondents rendered financial services to complainant. For convenience, I refer to first, second and third respondents as respondent. Where appropriate, I specify which respondent is referred to.

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[7] The salient points of the respondent's reply, are summarized below. For convenience, I comment where necessary:

7.1 The respondent submits that complainant's risk profile suggested that she was a moderate investor.

7.2 The respondent denied that the investment was presented as safe. The investment, according to respondent, was fully explained with no

assurances and the detail provided in the prospectus was furnished to complainant.

7.3 The respondents suggested that up until early 2010, there was no indication that Sharemax was a risky scheme. Sharemax was approved and issued a license to operate by the Financial Services Board (FSB). Its financial statements and all compliance processes were scrutinised from time to time by the FSB as the regulator, especially since Sharemax had been trading for 10 years, so claim respondents. On the question of liquidity, respondents state that they were involved with clients who wanted to sell their shares and who managed to complete the transactions successfully.

7.3.1 These statements by respondents suggest that they had no appreciation of the risks involved in the Sharemax investment. First, respondents chose not to proffer any response to the affront to the regulations contained in Notice 459, (which were glaring from the prospectus they claim to have explained to their client).

Likewise, respondents offer no explanation why they advised their client on this investment despite the gratuitous advances of large amounts of investors' monies to Brandberg.

The respondent was not dissuaded by the obvious conflict of interest on the part of the directors of Sharemax. He could not see that the Sharemax directors wore too many hats and this spelt

trouble for investors. All of this was in the prospectus and respondent ignored it.

7.3.2 The FSB does not product regulate the industry, nor does registration of the prospectus by the Department of Trade and Industry suggest that the product is suitable to the complainant, taking into account her circumstances.

7.3.3 Thirdly, it is the duty of an FSP to ensure that they understand the prospectus in order to market the underlying product responsibly. The fact that the prospectus was registered and the provider was licensed by the FSB does not absolve the FSP of his duties to satisfy himself that the risk in the product is commensurate with his client's circumstances. As it is, the high risk Sharemax product had no place in complainant's investment portfolio even if complainant was a moderate investor as claimed by respondent.

7.3.4 In summation, the respondents' failure to warn complainant that he had no appreciation of the risks involved in the product compounded the risk for the complainant as the latter relied solely on the advice provided.

7.4 Citing the guidance note which was published on 24 June 2015, respondent is of the view that USSA should accept vicarious responsibility for the activities of its agents. Respondent argued that this Office should not have relied on *Black v Moore*.

7.4.1 The first respondent has not provided proof of employment with USSA, nor a service mandate. Although a disclosure document from USSA was made available to the complainant for signature, there is no proof that USSA took responsibility for their actions in rendering advice on this product.

7.4.2 In fact, a careful reading of the USSA document points to an attempt to transfer the duties imposed by the Code from respondent to complainant, which is unfair. That being said, respondent is perfectly aware that FSP Network t/a USSA was liquidated in 2013 and it would serve no purpose to join them as a party.

7.4.3 The respondent has misconstrued the application of section 13 (1) (c) and the purpose of the explanatory Board notice. It was not intended to absolve a respondent from its duties under the Code. Whilst it is correct that the principal is vicariously liable for the actions of its representatives, the Code nonetheless includes a representative under its definitions of a provider. It would defeat the purpose of the Act and the Code if a provider could merely hide behind its appointment as a section 13 representative in order to escape liability when it violates the provisions of the Code.

7.5 The respondent argued that the investment was never presented as an "interest investment vehicle", but a "commercial property investment" by a "trusted Sharemax Property Syndication" for longer than 10 years. The

promise of 12.5% interest was in line with industry standards, as the IPD SA Property Index showed a 13.3% return in 2010.

7.6 The respondent concluded stating that the pending matter of *Deon Pienaar v the SARB*[1] will finally bring justice to this matter, and other recommendations and determinations.

7.6.1 The respondent does not state how the outcome of the Deon Pienaar matter is likely to influence decision made in this compliant.

7.7 The respondent further submits that he cannot be held liable for the alleged wrongdoings of the Reserve Bank, the FSB and the DTI.

7.7.1 The respondent fails to see that this case is about his advice to the complainant, which advice in terms of the Code must be suitable to the client's circumstances. Not one of the three entities is charged with the duty to advise the complainant. The respondent misdirected himself.

D. FINDINGS

[8] It is concerning to note that, despite the overwhelming evidence as set out in the recommendation, respondent still fails to see the obvious high risk in Sharemax, and therefore the inappropriateness of the product in relation to the complainants' specific circumstances.

[1] The matter allegedly relates to a request for a declaratory or in respect of the Reserve Bank's actions at the time that it suspended the operations of Sharemax.

[9] The respondent furthermore failed to deal with the questions raised in the section 27 (4) notice, which confirm that the respondent had no appreciation of the risks inherent in this investment.

E. CAUSATION

[10] The principles of causation were explained in *Muller v Mutual and Federal Insurance Co Ltd*[2]*:*

"…..the problem of causation in delict involves two distinct enquiries. The first is whether the defendant's wrongful act was a cause of the plaintiff's loss (factual causation); the second is whether the wrongful act is linked sufficiently close to the loss for legal liability to ensue (legal causation or remoteness)".

[11] In the matter of *Smit v Abrahams*[3] two tests were identified: the direct consequences test and the reasonable foresight test. The former was explained as follows[4]:

"The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act".

Farlam AJ pointed out in the *Smit* case that the principle upheld in the matter of *Overseas Tankship (UK) Ltd v Morts Docks & Engineering Co Ltd*[5] is subject to

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2 1994 (2) SA 425 (C)

3 1992 (3) SA 158 (C)

4 See also in this regard *Foundational Principles of South African Medical Law* Carstens P and Pearmain D (2007), pages 509 – 515 in respect of causation

5 1961 AC 388 (PC); 1961 1 All ER 404

two qualifications. As long as the “kind of damage” is foreseeable, the extent need not be. Furthermore, the precise manner of occurrence need not be foreseeable.

[12] In this case, the loss to investors was not only reasonably foreseeable, it was inevitable.

[13] The complainant’s loss was not caused by management failure at Sharemax or the intervention of the Reserve Bank, but by the respondent’s inappropriate advice. The respondent knew that the complainant relied on him for advice. Had respondent adhered to the Code, no investment would have been made in Sharemax. The complainant sought an investment that would keep her capital intact. The prospectus of Zambezi is clear that the shares on offer are unlisted, and that the investments must be seen as a risk capital.

[14] That is not all: for all the reasons mentioned in the recommendation, the investment was high risk and inappropriate for the complainant. That the risk actually materialized, for whatever reason, is not important. Otherwise the whole purpose of the Act and the Code would be defeated. Every FSP can ignore the Act and Code in advising clients and hope that the investment does not fail. When the risk materializes and results in loss, they can hide behind unforeseeable conduct on the part of product providers, or other interested parties.

[15] The findings made in the recommendation letter are hereby confirmed.

F. THE ORDER

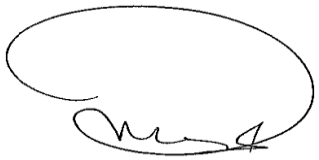
[16] In the result, I make the following order:

1. The complaint is upheld.

2. The respondents are ordered to pay the complainant, jointly and severally, the one paying the other to be absolved, the amount of R800 000[6].

3. Interest on this amount at a rate of 10.25% per annum from the date of determination to date of final payment.

DATED AT PRETORIA ON THIS THE 16TH DAY OF MARCH 2018.



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[6] See in this regard paragraph 16 and 19 of the recommendation in respect of quantum.