

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 09479/10-11/GP1

In the matter between:-

MARGARET LILIAN POSGATE

1st 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 Margaret Lillian Posgate, an 86 year old female retiree of Parkhurst, Johannesburg, Gauteng Province.

- [2] First Respondent is D Risk Insurance Consultants CC, a close corporation duly incorporated in terms of South African law, with its principal place of business at 60 Van Riebeeck Avenue, Edenvale, Gauteng Province. First Respondent is an authorised financial services provider in terms of the FAIS Act, with license number 12806.
- [3] Second Respondent is Deeb Raymond Risk, a male of adult age, a key individual and representative of First Respondent. Second Respondent is the authorised representative of First Respondent. At all times material hereto, Complainant dealt with Second Respondent. For convenience, I refer to First and Second Respondent as Respondent.

B. BACKGROUND

- [4] On 11th January 2011, Complainant lodged a complaint with this Office. It appears from the complaint that on 27 June 2008, Complainant had invested an amount of R170 000.00 in a public property syndication scheme on the advice of Respondent. Complainant's investment was in a Sharemax scheme known as Zambezi Retail Park. The investment was to provide a monthly income to Complainant. Complainant states that at the time, the funds invested accounted for a significant source of her income.
- [5] By 30th September 2010, the monthly income payments had ceased. Distressed, Complainant wrote to Respondent on 11th January 2011, explaining that the suspension of the income on the investment had an adverse substantial impact on her daily standard of living. She requested from him proof that he had conducted a needs analysis, a copy of the record

of advice and her risk assessment. It appears that after discussions with another broker, Complainant realised what processes should have been followed at the time Respondent had sold the investment to her.

[6] Thereupon Respondent responded through his attorneys, Bieldermand Inc., on 28th January 2011 and provided the following documents:

[6.1] Personal Portfolio Risk Profile Questionnaire.

[6.2] A "Compulsory cover page for new investments" on a Sharemax Investments (Pty) Ltd letterhead.

[6.3] A cheque in the amount of R170 000,00 made out to Weavind and Weavind Inc. by Complainant.

[6.4] A Sharemax Zambezi Retail Park Application form for linked units.

[6.5] A document titled "Sharemax Investments risk assessment on product information".

[6.6] A Life Insurance/investment portfolio prepared for Complainant by Respondent.

[7] Not satisfied with this, Complainant persisted with her request for a record of advice in respect of the investment, which showed that Respondent had taken into account her overall portfolio, her income and the risk involved. She further wanted proof that such record of advice was signed by her.¹

[8] Complainant also pointed to the Risk profile questionnaire where she had indicated a rate of return of 8% as a safer yield level. She requested an

¹ Complainant's letter to Bieldermand Inc. dated 1 February 2011.

explanation why she was put into an investment that was riskier than the 8% level.

[9] Respondent, through his attorneys, responded on 14th February 2011:

[9.1] That Respondent had full and detailed discussions with complainant regarding the investment.

[9.2] That Complainant had been furnished with a complete copy of the prospectus, which prospectus had been discussed with Complainant in full.

[9.3] That the documents provided to her constituted Respondent's "written record of advice". He mentioned that, a record of advice is "simply a written confirmation signed by the investor that the financial advisor has in fact discussed relevant issues with such an investor taking into account the investor's personal circumstances."

[9.4] That Complainant had "perhaps misread" the risk profile questionnaire and in particular question 9. In this regard, Bieldermand explained:

"The document is a composite document containing eleven relevant questions. These questions have all been designed to extract information from a potential investor to determine the investor's risk profile and needs. Each question has been "weighted" with a score being allocated to each question. These scores are then added together and the total represents your "risk value." Based on this risk value your risk profile is determined. Please refer to page 3 of the document which was also clearly signed by you. It is not correct to simply extract one question from the document and utilise same in isolation. Our

client in any event would not do so as this would not render proper results.”

[10] Having realised that the investment Respondent had placed her in was not suitably safe for an 83 year old (the age Complainant was at the time of investing in Sharemax), complainant lodged her complaint with this Office.

[11] In her complaint to this office, Complainant complained that despite the fact that her risk assessment indicated that she would feel comfortable with a lower risk level, Respondent placed her funds in a higher risk investment. Complainant states that she had not been made aware of the risks associated with the Sharemax investment and neither was the investment suitable to her as an elderly person who wanted a guaranteed income over the term of her investment.

[12] Complainant also became aware that pertinent information relating to the investment such as commission, was only provided after she requested it.

C. COMPLAINT

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

[13.1] Following advice by Respondent, Complainant invested an amount of R170 000.00 into Sharemax Zambezi Retail Park. In recommending the investment, Respondent is alleged to have failed to properly advise Complainant, in that he failed to take into account Complainant's risk profile. He failed to disclose the risk associated with the investment, as

required by the General Code of Conduct for Authorised Financial Services Providers, (the General Code).

[13.2] Respondent is also alleged to have failed to maintain and furnish a record of advice to Complainant in compliance with the General Code.

[13.3] As a result of Respondent's failure to render financial services in compliance with the General Code, Complainant has lost a significant source of her income. Complainant holds Respondent liable for the loss of her income and capital.

D. THE RELIEF SOUGHT

[14] Complainant has asked for the payment of her capital of R170 000.00 plus 8% interest from September 2010.

E. RESPONDENT'S VERSION

[15] On 13 April 2011, the complaint was referred to Respondent in terms of Rule 6 of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers (the Rules), affording him the opportunity to resolve the complaint with Complainant.

[16] On 25 May 2011, Respondent filed his response. The response was submitted in the form of an application in terms of section 27 (3) (c) of the FAIS 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. It is noted that Respondent states in paragraph 6 of his affidavit that he does not deal with

the particulars of the complaints 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. In what follows below, I summarise the response to the merits:-

- [16.1] Respondent avers that Complainant was referred to him by one of his existing clients during January 2007. During a meeting with Complainant on 22 January 2007, he furnished Complainant with a Letter of Introduction and Disclosures which were signed by her on the same date.
- [16.2] At the same meeting Respondent discussed Complainant’s financial position including her investments. In this regard a Risk Profile Questionnaire was completed.
- [16.3] Prior to assisting Complainant in investing with Sharemax, Respondent assisted her to invest R130 000.00 in the property investment group PIC Investments (“PIC”) which yielded an income of 11% per annum. Complainant then appointed him as her new financial advisor for her Southern Equity Linked Life Annuity. On Complainant’s instructions, he switched her portfolios and adjusted her income in order to yield the best possible monthly return in accordance with her needs. Respondent later assisted Complainant with the disinvestment from the PIC syndication and Stanlib. In addition, Respondent rendered on-going assistance to Complainant with tax return submissions.
- [16.4] When complainant’s PIC investment was realised, complainant was pleased with the interest she received.

- [16.5] On 26 June 2008 Respondent introduced Complainant to the Sharemax Zambezi Retail Park No 4, property syndication. Respondent furnished Complainant with the full prospectus and went through it in detail. In addition he also furnished her with a document titled "Sharemax Zambezi Retail Park - Explanation of Prospectus No. 4."
- [16.6] Complainant then purchased 170 units in Zambezi Retail Park No. 4, which would yield an income of 12% per annum. Respondent avers that, as Complainant had previously invested in property syndication, she was fully aware of the risk associated in purchasing unlisted shares. According to Respondent, Complainant's previous experience with property syndication had been favourable and she was eager to once again invest in property syndication.
- [16.7] As a result, the application forms for the purchase of 170 units in Zambezi Retail Park No. 4 were completed and signed by Complainant, on the same day. The Application form and the Investment Risk Assessment formed part of the prospectus furnished to Complainant. A cheque was also drawn in favour of Weavind & Weavind, the attorneys representing Sharemax at the time.
- [16.8] Respondent is of the view that he fully complied with all his duties and obligations as a financial services provider. He states that subsequent to June 2008, he did not do any further business with Complainant except in assisting her with tax returns and monitoring her portfolio.
- [16.9] Respondent denies Complainant's allegation that he did not provide fair, honest and appropriate advice with her best interests in mind.

- [16.10] With regard to Complainant's allegation that Respondent placed her in an investment which was not "suitably safe for an 83 year old," Respondent refers to Complainant's prior experience in a property syndication investment, namely the PIC Investment. He states that Complainant only complains now that the income has stopped and that she was happy all along.
- [16.11] Respondent further pointed to Complainant's risk assessment wherein she indicated that the total return she would expect on an investment would be 10% per annum. Respondent believes that Complainant was mistaken in saying that she would be comfortable with income levels of 8% because in the PIC investments, the risk level had been higher than 8%.
- [17] Respondent states that there are obvious discrepancies and disputes between the versions of Complainant and his, on essential events. He then asserts that these factual disputes cannot be determined on unattested and untested conflicting versions of events, made on paper. Respondent accordingly submits that oral evidence on oath and cross examination is required in order for the finder of fact to determine the truth.
- [18] About the legality of the Sharemax model and the events surrounding The Villa, Respondent states that when he assisted complainant to invest in Zambezi, he was not aware of any questions regarding the solvency and the legality of the business model of Zambezi. It was only from about the middle of 2010 that he learnt through the public media that The Villa had defaulted on

the interest payable to investors. He then followed the events surrounding Zambezi in the press.

[19] He believes that the South African Reserve Bank, (SARB) has appointed judicial managers for 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 Zambezi will recommence payment of interest and completes its project or whether it may fail or even be liquidated. Whether or not any investor in Zambezi will lose his or her investment and if so what the percentage of the loss may be and whether Zambezi will be able to trade itself into profitability, are questions the answers to which are completely unknown at this stage. He states, it is also unknown whether any investor in Zambezi will suffer any actual loss. It is all pure speculation, one way or the other.

[20] In Respondent's view, the complaint is premature and as such, no decision concerning any compensation claimed by complainant from him may be made, before it is determined whether Zambezi will fail.

[21] Respondent finally submits that no decision can be made concerning his negligence on the grounds alleged by 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.

[22] On 9 June 2011, this Office issued a Notice in terms of Section 27 (4) of the FAIS Act, requesting from Respondent *inter alia*:-

- (a) A copy of the record of advice,
- (b) Financial needs analysis, and
- (c) Risk profile analysis.

[23] In response, Respondent replied that he stood by the contents of his previous response to this Office and had nothing further to add.

F. ISSUES

[24] There are four issues to be determined.

[24.1] Jurisdiction of this Office;

[24.2] Whether respondent in rendering financial services failed to comply with the Code;

[24.3] In the event it is found that Respondent failed to comply with the Code, whether such conduct caused the complainant financial prejudice complained of; and

[24.4] Quantum.

Jurisdiction

[25] Upon referring the complaint to Respondent in terms of Rule 6 (b) of the Rules on Proceedings of the Ombud for Financial Services Providers, (the Rules), respondent advised this Office that he denies the allegations and fully

reserves his rights to respond thereto, in the appropriate forum and at the appropriate time.

[26] In response to a notice dispatched by this Office in terms of section 27 (4) of the FAIS Act, respondent lodged what he termed, an application in terms of section 27 (3) (c). The purported application sought that the Ombud determine that it would be more appropriate that the complaint be dealt with by a court of law and decline it. In the affidavit annexed to the so called application, respondent stated that he did not deal with the particulars of the complaints and reserved the right to do so when it became necessary. Respondent raised the point that there were obvious discrepancies and disputes between the Complainant's and his versions on essential events. The Respondent argued that these factual disputes could not be determined on unattested and untested conflicting versions of events made on paper. Oral evidence on oath and cross examination was required, in order for the finder of fact to determine the truth.

[27] Upon consideration of the response, this Office was of the view that it did have jurisdiction to entertain the complaint and proceeded with its investigation. In response, Respondent brought an application in the North Gauteng High Court, *inter alia* challenging the decision to entertain the complaint and seeking an order that the complaint be referred to a court, alternatively seeking an order setting aside the decision, not to convene a

hearing before determining the complaint and compelling this Office to convene such a hearing.²

[28] The court delivered its judgement on 4 September 2012, dismissing the application with costs. Judge Selby Baqwa in his judgement stated:

“The effect of section 27(3)(c) (supra) is that first respondent retains jurisdiction over a complaint unless she, on reasonable grounds makes a determination that it should be dealt with by a court or any alternative dispute resolution process. It has been submitted and I accept that first respondent administers an institution, which in terms of FAIS demands efficiency and economy and that this may indeed justify the lack of a public hearing in circumstances, which may be resolved quickly and with minimal formality.”

The section confers neither a right on applicant to demand that the ombud declines her jurisdiction to deal with complaints, nor does it confer a duty for her to do so. The section clearly confers discretion on the first respondent. Any other interpretation would be tantamount to stripping her of her statutory powers in terms of [the] FAIS Act. Absent a decision by the first respondent to refer the matter to a court, she retains jurisdiction.³

² DR Risk and D Risk Insurance Consultants vs the Ombud for Financial Services Providers and others Case no 38791/2011. Judgement handed down on 4 September 2012. The issues are summarised from paragraph 7 to 12 of the High Court's ruling.

³ At paragraph 38 supra.

[29] Accordingly, the above-mentioned judgement made it clear that this office has jurisdiction to entertain the complaint.

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

[30] The essence of the Complainant's complaint is that in recommending the investment Respondent failed to properly advise her. She asserts that the respondent failed to take into account her risk profile and to disclose the risk associated with the investment as required by the General Code of Conduct. In other words, Respondent failed to act in her interests. As a result of Respondent's conduct, Complainant says that she has lost a significant source of her income.

[31] In his response, Respondent relied extensively on amongst other things, certain documents signed by Complainant during the rendering of the financial services. He points to the previous property syndication in which Complainant had invested and documentation signed by complainant, saying that she was fully aware of the product in which she was investing and this clearly indicated that she accepted and understood the context and import of the documentation and the investment.

[32] In support of his contention, Respondent furnished this Office with *inter alia* a risk profile carried out for Complainant, which concludes that Complainant is an "assertive to medium risk investor."

[33] He points out that in the document, Complainant indicates that the total return that she would expect on an investment would be 10% per annum and that Complainant is mistaken in saying that 8% was the income risk levels that she would be comfortable with. He says that this is contradictory to the “risk level that she was comfortable with when she invested in PIC.”

[34] However, an analysis of the document reveals the following additional factors:

[34.1] The primary purpose of the investment was retirement planning;

[34.2] The investment amount accounts for approximately 5-10% of Complainant’s then total net worth;

[34.3] Complainant expected her future earnings over the next 5 years to stay ahead of inflation;

[34.4] Complainant’s sought growth of capital over the medium-term and was prepared to accept only moderate levels of risk;

[34.5] Complainant had previously invested in equities and understood and felt comfortable with the level of risk involved;

[34.6] Complainant placed herself as a low to medium risk;⁴

[34.7] Complainant did in fact indicate a total expected return of 8% which represented a safer yield than the 10% Respondent alleged she chose.

[35] Notwithstanding complainant’s answers as reflected in 34.4 and 34.6 above, the total scored form placed complainant in the assertive to medium risk investor profile. No explanation is given in the risk profile or any other document prepared at the time regarding why Respondent felt that more

⁴ Inexplicably, for this question (No 8) there are two answers provided which read “low to medium risk” each allocated with a different score, 6 and 8. For unknown reasons, Respondent allocated the higher score to Complainant, thereby amplifying her overall score by 2 points.

weight should be placed on the scored outcome of the risk profiling form than on complainant's own assertion that she was a low to medium risk investor.

[36] Strangely, this document which purportedly justified Respondent's recommendation, that the Sharemax Zambezi investment was appropriate for complainant's risk profile, was signed on 22nd January 2007, seventeen months before the Sharemax Zambezi investment was purchased. It is perfectly conceivable that Complainant's personal and financial circumstances might have changed during this time. However the Respondent does not appear to have taken this into account.

[37] Instead, as further support for his argument, Respondent directs this office's attention to an Investment Risk Assessment which forms part of the Sharemax application form. On the document, it is stated that the purpose of the assessment is to ensure that the investor understands all benefits and risks involved in the investment product. However, the document does not deliver on its intended purpose.

[38] The document is dealt with at length in the Barnes (1) determination. It should be pointed out that all the questions on the form completed by Complainant are answered in the affirmative – in exactly the same style as with the one completed by Barnes in that matter. Some points however bear repeating. In what follows, I once again deal with the important points that arise from the document.

[39] The first question asks whether the advisor provided Complainant with the prospectus. The answer is yes. Respondent in his response states that he

furnished Complainant with a full prospectus and further “went through the prospectus with [Complainant] in detail.”

[40] The prospectus in question is the Sharemax Zambezi Retail Park Holdings Limited Prospectus 4 – a 100 page document consisting of complicated legal terms and explanations of the investment structure, which seems designed to confuse the lay reader. It is difficult to understand how an 83 year old pensioner could appreciate the contents of the prospectus. I have previously remarked on this prospectus and my remarks stand in this instance as well.⁵

[41] Respondent denies that the investment was not “safe.” It is not clear how respondent arrives at that conclusion, when the prospectus itself states:

“...the attention of the public is drawn to the fact that the shares on offer are unlisted and should be considered as a risk capital investment. Investors themselves are therefore on risk, as unlisted shares and the claims are not readily marketable and should the Company fail this may result in the loss of the investment to the investor.”⁶

[42] This should have been read with paragraph 4.2.1:

“The Company has never traded prior to the registration of this Prospectus...”

[43] At paragraph 5.3.2:

⁵ See paragraphs 18 of the G Orpen v D Risk Insurance Consultants CC and Deeb Raymond Risk determination, under Case Reference FAIS 06467/10-11/GP 1 available on the FAIS Ombud’s website, www.faisombud.co.za.

⁶ Page 4 of the prospectus.

“ Should investors, however, wish to sell their Units, Sharemax will assist them to effect such sale at a market-related commission; provided however that Sharemax shall not provide any assistance in this regard to investors, if such sale is to take place within the first 24 (twenty four) months of the investment.”

[44] At paragraph 5.3.3:

“Investor’s attention is drawn to the fact that it is not the function of the Promoter to find a buyer, should the Investor wish to sell his shares and that it is the Investor’s responsibility to find his own buyer. (See paragraph 5.16 below)”

[45] Then at paragraph 5.16 under the heading **Risk**:

“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.”

[46] Section 8(2) of the Code provides:

“the provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision.”

[47] There is no doubt that Respondent himself did not properly understand the prospectus. If he had, he would surely not have labelled the investment as “appropriate” to Complainant’s need to be invested in a low to medium risk investment.

[48] In my view, the evidence does not support Respondent's argument that Complainant fully understood the product she was investing in. Complainant was not in a position to make an informed decision.

The risk inherent in Sharemax Zambezi

[49] I canvassed this issue in the Barnes (1) determination⁷. The comments I made there apply in the present matter with the necessary changes. It follows that this determination needs to be read with the Barnes (1) determination.

[50] The Sharemax Zambezi investment was high risk and not compatible with Complainant's stated need for a low to medium risk investment.

Compliance with Section 9 of the Code: The duty to maintain a record of advice

[51] According to Respondent, the personal portfolio-risk profile questionnaire, Sharemax application form and schedules, Sharemax Investments Risk Assessment form and the Life insurance/investment form all constitute Respondent's written record of advice.

[52] Respondent initially argued that a record of advice is "simply a written confirmation signed by the investor that the financial advisor has in fact

⁷ E Barnes v D Risk Insurance Consultants cc and Deeb Raymond Risk- FAIS 06793/10-11/GP 1, available on the FAIS Ombud's website; www.faisombud.co.za

discussed relevant issues with such an investor taking into account the investor's personal circumstances.”⁸

[53] He later argues however, that the regulations prescribed by the FAIS Act do not define what would constitute an “advice record.”⁹

[54] Contrary to the Respondent's assertions, Section 9 of the General Code clearly provides that: *“a provider must, subject to and in addition to the duties imposed by section 18 of the Act and section 3(2) of the General Code, maintain a record of the advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given, and in particular:-*

(a) a brief summary of the information and material on which the advice was based;

(b) the financial product/s that were considered;

(c) the financial product or products recommended, with an explanation of why the product or products have been selected or are likely to satisfy the client's identified needs and objectives;...”

[55] Conspicuously absent in the records provided by Respondent, are all the above. These are: (1) the financial products considered; and (2) the basis for recommending the Sharemax investment. In other words, why was the Sharemax investment likely to satisfy Complainant's needs and objectives?

⁸ Correspondence to complainant dated 14 February 2011.

⁹ Paragraph 20 of Respondent's response dated 25 May 2011.

These are the duties with which the General Code charges financial services providers to address when providing advice.

[56] Apart from a risk profile conducted seventeen months earlier and reliance on the fact that Complainant had a previous investment in another property syndication and Complainant's stated long-term investment horizon, Respondent can show no evidence that the Sharemax investment was appropriate to Complainant's needs. In any event, as shown in this determination, the information on which this product was allegedly recommended was not accurate and complete. It also appears that no other financial products were considered or recommended.

[57] Respondent places much reliance on the seventeen month old risk profile as proof of his diligence. Even on the outdated risk profile, the product will still be inappropriate. It is always important to conduct the necessary risk profile as the person's circumstances are always subject to change with the passage of time. In my view, Respondent's intention was to peddle this investment, regardless of Complainant's needs and objectives.

[58] The Code is unequivocal in Section 2:

"A provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry".

[59] Respondent did not comply with section 2 of the Code.

[60] There is nothing in any other document furnished by respondent to this Office that satisfies the requirements of section 9 (1) of the Code.

G. FINDINGS

[61] I am satisfied that Respondent failed in his duty to disclose the material aspect of risk inherent in Sharemax Zambezi investment.

[62] Respondent failed to appropriately advise Complainant, in that he failed to recommend products commensurate with Complainant's risk tolerance.

[63] Respondent did not take reasonable steps to ensure that Complainant was in a position to make an informed decision.

[64] Respondent failed to comply with Section 9 of the General Code in that he failed to maintain a record of advice as envisaged by the code.

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

H. QUANTUM

[66] Complainant invested R170 000 in the Sharemax Zambezi scheme. Complainant has not been paid any income since September 2010. All of this supports complainant's contention that she has lost her capital of R170 000.00.

I. ACCOUNTABILITY

[67] I now turn to the issue of joint and several liability of the Respondents herein. I have held that the 2nd Respondent failed to comply with the Code in the rendering of the financial service herein. 2nd Respondent is a member and key individual of 1st Respondent. If I were to hold 1st Respondent solely liable this would not be in line with what the legislature intended as evidenced by section 8 of the FAIS Act. I say so for the following reasons:-

- (a) In terms of section 8 (1) (c) of the FAIS Act in instances where a financial services provider is, amongst others a corporate body, the applicant for licensing must satisfy the registrar that any key individual in respect of such applicant complies with the requirements of personal character qualities of honesty and integrity; and competence and operational ability'. It is only when the registrar is satisfied that that an applicant meets these requirements that a license will be granted.
- (b) Additionally 'no such person may be permitted to take part in the conduct or management or oversight of a licensee's business in relation to the rendering of financial services unless such person has on application been approved by the registrar.
- (c) Section 8 (5)(ii) additionally requires that upon the change in the personal circumstances of a key individual a registrar may impose new conditions on the licensee. From the obligations imposed on the key individual it is clear that it is the key individual himself that is personally responsible to satisfy the registrar that he is fit and proper. Authorisation of the entity is approved through the key individual himself.

(d) The fact that where the key individual does not meet the legislative requirements of fit and proper, the corporate entity's license can be withdrawn simply means the intention of the legislature is to hold both persons accountable. The General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code) clearly envisages that the general and specific duties of a provider of financial services are those that are performed by a natural person as opposed to an artificial persona. This is evident in:-

- (i) the definition of "provider" includes a representative;
- (ii) the general duty of a provider in Section 2 of the Code requires that financial services be rendered with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry. This can only be performed by a natural person;
- (iii) The various specific duties regarding the rendering of a financial service set out in section 3 require human intervention;
- (i) So too all the requirements set out in Parts III, IV, V and VI.

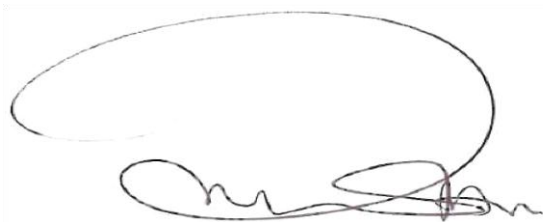
[68] 1st Respondent is the licensed provider under whose name the financial service was rendered. On his own version, 2nd respondent is an authorised financial services provider and key individual of 1st respondent. Therefore, it is necessary that I hold both respondents liable jointly and severally, the one paying the other to be absolved.

J. ORDER

In the premises the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to Complainant the amount of R170 000,00 in respect of the investment in Sharemax Zambezi Retail Park Holdings Limited (Prospectus 4);
3. Complainant is to hand over, upon full payment, all documents and securities, forgo any rights or interest pertaining to the investment in Sharemax Zambezi Retail Park Holdings Limited (Prospectus 4) in favour of respondents;
4. Interest at the rate of 15.5 % , from a date seven (7) days from date of this order to date of final payment;

DATED AT PRETORIA ON THIS THE 22nd DAY OF NOVEMBER 2012.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

