

the investment; and (iv) Did the Ombud err by dismissing the views of the expert Mr Cohen regarding the viability of the Sharemax / Zambezi and Villa structures without obtaining Ombud's expert evidence in this regard.

Did the Ombud err concluding that the Applicant failed to take reasonable steps to ensure that the First Respondent understood the investment and its associated risk?

30. Section 16 of the FAIS Act which deals with the principles of Code of Conduct requires, amongst other things, that the Code of Conduct must ensure that the clients receiving financial services are enable to make an informed decision and that their financial needs are appropriately and suitably satisfied.

31. The Code of Conduct states, amongst other things, in section 3(1)(a) that when a provider renders a financial service, representations made and information provided to a client by the FSP:-
 - 31.1 must be factually correct; and

 - 31.2 must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client.

32. Further, the Code of Conduct provides in section 7(1)(a) that an FSP must provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision.

33. Furthermore, section 8 of the Code of Conduct which deals with suitability of advice, provides, amongst other things, in section 8(1) that an FSP, must, prior to providing a client with advice:-
- 33.1 take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the FSP to provide the client with appropriate advice;
 - 33.2 conduct an analysis, for purposes of the advice, based on the information obtained; and
 - 33.3 identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the FSP under the Act or any contractual arrangement.
34. In respect of the Record of Advice, the Code of Conduct provides, amongst other things, in section 9(1) that an FSP must, 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-
- 34.1 a brief summary of the information and material on which the advice was based;
 - 34.2 the financial products which were considered; and
 - 34.3 the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives;

provided that such record of advice is only required to be maintained where, to the knowledge of the FSP, a transaction or contract in respect of a financial product is concluded by or on behalf of the client as a result of the advice furnished to the client in accordance with section 8.

35. This Tribunal has maintained the view that the provisions of the Code of Conduct, apart from anything else, can be considered to be implied terms of the mandate or contract between the FSP and the Client.¹¹

36. In the case of *CS Brokers CC and Others v Ian Marais and Another* (“CS Brokers”), Harms J stated the following regarding contract between an FSP and a client:

*“The contract requires of an FSP to give advice with appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and **that it caused loss.** In deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs”¹² (own emphasis)*

37. According to the records before us the Ombud maintained that there is no independent record of advice which shows that the Applicant made a full disclosure to the First Respondent, so that the latter can make an informed

¹¹ CS Brokers CC and Others v Ian Marais and Others Case No. FAB5/2016 (“CS” Brokers”), par 24

¹² CS Brokers CC par 23