IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 09619-10/11 FS 1

In the matter between

HENDRIK EVERHARDUS GRUNDLING DU PREEZ **Complainant**

and

ERNEST VENTER t/a ERNEST VENTER MAKELAARS **Respondent**

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

A. INTRODUCTION

[1] Complainant is a farmer who is currently 87 years old. He made investments in Sharemax property syndication with the advice and assistance of respondent. That respondent acted as a licensed financial services provider (FSP) in recommending and facilitating the investment is undisputed. The investments failed and complainant lost his capital as well

as the promised returns. We now know that there is no prospect of Sharemax investors recovering any part of their capital and promised returns.

[2] The parties were given an opportunity to settle the matter, but this was to no avail. In fact, the complainant consulted his attorneys and requested that they write to respondent claiming return of his money. Complainant's attorneys even requested that respondent sell or find a buyer for complainant's shares. Respondent firstly made it plain that no one, in the circumstances, will purchase Sharemax shares and secondly, that he cannot be held responsible for complainant's loss.

B. THE PARTIES

[3] Complainant is Hendrik Everhardus Grundling du Preez, an adult male farmer who was born on the 4 February 1933. He resides on his farm, Nooitgedacht, in the district of Hennenman, Free State province.

[4] Respondent is Ernest Venter an adult male who trades as an FSP under the name and style of Ernest Venter Makelaars of 24c Hertzog Street, Hennenman. Respondent is the sole proprietor of Ernest Venter Makelaars. Respondent was registered with the Financial Sector Conduct Authority (FSCA) under licence number 15127. In terms of this licence, respondent was authorised to sell category 1 (one) financial products. This means that he was not licenced, in his own right, to sell the Sharemax product. I deal with this below.

C. THE COMPLAINT

[5] Complainant was approached by respondent with the object of persuading complainant to make investments in Sharemax. In November 2008, respondent visited complainant at the latter's farm. The visit was not at the instance of complainant but was at the request of

respondent. At that time the 78-year-old respondent had conducted all his investments through ABSA Bank.

[6] Complainant indicated that he was not looking for investment opportunities. Respondent nevertheless wanted to introduce him to Sharemax investments. This is what the complainant states, I quote it as it is significant: *"Venter told me about Sharemax and although I was skeptical (sic) Venter assured me that Sharemax was a sound investment. He also advised that he is very confident in investing in Sharemax. He told me that Sharemax purchased properties, renovated it and ultimately rent it out. He advised me that if you invest in these properties the monthly interest will be paid to you."* (my emphasis)

[7] On the 27 November 2008 complainant, through respondent, invested R100 000 – 00 in Sharemax, Zambezi Retail Park Holdings Ltd (Zambezi).

[8] During November 2009 respondent approached complainant again and convinced him to make a further investment in Sharemax. On the 12 December 2009, complainant, through respondent, invested R100 000 – 00 in Sharemax, The Villa Retail Park Holdings Ltd (The Villa).

[9] Interest payments from Zambezi began decreasing and in July 2010, payments stopped. As for the Villa, interest payments were received as promised but also came to a halt in July 2010. Since July 2010 no further payments were received in respect of both investments. Complainant subsequently heard on the news that Sharemax was in trouble.

[10] In August 2010 complainant instructed respondent to cancel the investments and get back his capital in the amount of R200 000 – 00. Respondent merely gave an assurance that *"everything was alright and we should be receiving our interest soon".* There were no further interest payments and complainant received no response from respondent regarding the capital.

[11] Having failed to illicit any response from respondent, complainant instructed a firm of attorneys to make inquiries. An attorney contacted Sharemax and was told the following:

a) That neither Zambezi nor The Villa have been completed;

b) The Villa project could possibly be completed within 12 months but will require about R150 million. Only if the project is completed, Sharemax will consider paying out the accumulated interest or shares to the equivalent value of the interest will be given to shareholders.

c) Zambezi required a bond to complete the project and no time period for its completion was available.

d) All payments to investors were indefinitely suspended;

e) Investors had no option to cancel their investments.

f) The only alternative to cancelling was for brokers to be instructed to sell the shares privately.

[12] Complainant also read articles in the media that Sharemax had contravened the Banks Act and that neither Zambezi nor The Villa had been transferred to the syndication vehicles. Having read this, complainant addressed a letter dated 10 January 2011 through his attorneys, to respondent instructing him to find a buyer for his shares. There was no response from respondent.

[13] On the 4 February 2011 respondent contacted complainant's attorney and informed as follows:

a) He confirmed receiving the letter dated 10 January 2011;

b) That both companies were in administrative liquidation;

c) That no one will buy the shares;

d) That he will contact Respondent directly to sort this out.

[14] On the 9 February 2011 complainant was handed an article dated 19 January 2011 which pointed out that investors cannot expect to be paid for a very long time and stood to lose their entire investments. On the 11 February 2011 respondent called and stated that investors will start receiving interest payments in approximately 3 years. He also stated that he will contact complainant's attorney and explain the status of Sharemax. Respondent never contacted the attorneys and it also turned out that Sharemax made no undertaking to make payments in 3 years. To the contrary, information appeared in the media that investors can expect no further payments and stand to lose their investments.

[15] Complainant then states the basis of his complaint. It is this:

a) Respondent never made a full and frank disclosure about the Sharemax investments. Complainant was therefore deprived of the opportunity to make an informed decision.

b) Respondent only presented Sharemax investments and presented no other suitable alternatives.

c) Respondent overemphasized the benefits of the investment and did not alert complainant about the risks in investing in property syndication.

d) Complainant was never shown a prospectus regarding the two projects. Complainant doubts if respondent carried out any independent verification into the projects nor does he appear to have gathered any relevant information about these projects.

e) Respondent never informed complainant what commission he received from Sharemax.

f) After payments ended, respondent created an illusion that *"everything was fine".* Complainant believes that respondent failed to give him accurate feedback and failed to act in his best interests.

g) Respondent, in giving advice to invest in Sharemax, did not act in the best interests of complainant.

h) Finally, complainant points out that respondent presented no alternative way of recovering his capital.

D. THE RESPONSE

[16] Respondent received the complaint from this office and presented his written response and supporting documentation. He disputes complainant's version regarding the circumstances around the investment. He however, does not dispute that he acted as an FSP and advised complainant to make the investments in Sharemax. A summary of his response is as follows:

a) He firstly expresses his distress that complainant feels hard done by as a result of his advice.

b) He states at the outset that at all material times, he did his best, as a broker, for his client the complainant.

c) He points out that complainant held the investments for two years before complaining about them. Respondent states that initially, complainant wanted to invest in Sharemax for only a year, but after a year he was so satisfied with the investment that it was the complainant who came to see him to make further investment in Sharemax. Here respondent adds that complainant must take responsibility for his own actions.

d) Respondent denies that he failed to contact complainant after payments stopped. He states that he collected as much relevant information as he could find and conveyed this to all his clients. He even arranged a gathering at the Savanna Restaurant, on the 17 August 2010, where his clients were invited to hear from a representative of Sharemax. He attempted to invite complainant to this "function" but complainant was not answering his phone.

e) According to information available to him, Sharemax had done nothing wrong. He tried to convey this information to complainant.

f) Respondent visited complainant at the farm because the latter needed assistance with a Sanlam policy. It was on this occasion that he told complainant about Sharemax. Later that year, complainant came to see him and said that he no longer wanted to invest in ABSA as the interest rates were too low. Respondent adds that complainant is well informed about investments and knew where to invest his money.

g) He points out that Sharemax had advertised widely and that made complainant feel more confident about investing in it. He was so happy with Sharemax that he approached the respondent to make a second investment in it.

h) From December 2009 to June 2010 complainant was happy with his investment. Then respondent points out that what happened with Sharemax was beyond his control. He also explains that he tried his best to sell complainant's shares but no one was interested.

[17] Thereafter respondent proceeded to respond to complainant's version and answered the material allegations as follows:

a) Complainant stated that he did not receive a prospectus. Respondent denies this and explains that Mr Coetsee, a representative of Sharemax, explained the prospectus fully to complainant and his wife, using his laptop computer.

b) That respondent failed to offer any other product, is also disputed. According to respondent complainant had already done his homework and came to the conclusion that Sharemax was the answer to his problem, that his ABSA investments only yielded an interest rate of 4 to 6%. Therefore, respondent knew that complainant was making an informed decision.

c) That respondent held the Sharemax investment out as a good investment is not disputed. He still confirms that Sharemax had sold its buildings at an enormous profit and this was shown to complainant. In fact, he had invested his own funds in Sharemax and even pointed out the buildings that were sold for good gains to the investors.

d) Regarding the question of commission, respondent states that he was paid 6% of the capital and such payment was made by Sharemax and complaint did not pay a cent in commission.

e) Respondent denies that, after payments stopped, he failed to inform complainant about what was happening. Besides, complainant had access to the media reports and feels that no one knows what happened with this Sharemax debacle. Respondent believed, at that time, that no one lost their money.

f) Respondent denies that he made no attempt to sell complainant's shares. He approached people and offered the shares and called Sharemax and asked them to advertise the shares. However, no one showed any interest.

g) Respondent had previously dealt with complainant's investments in his capacity as an ABSA broker. That is the reason why complainant trusted him and approached him again.

h) Finally, respondent avers that he acted in the best interests of his client and that he carried out his work "absolutely correctly". He states that no one could predict that

Sharemax would go wrong, that also explains why his own investments are still with Sharemax.

[18] In support of his response, respondent provided certain documentation. He was also responding to this office's request for him to produce his office file. Here I deal with the material documentation provided by respondent and I also make comment in so far as the documents are relevant to each party's version:

a) The first document that requires attention is the "Client Mandate" which was signed by both parties. This is a standard document containing a number of tick-boxes. Two clauses require comment. The first is that complainant ticked the box which states that this was a single need investment and that it was not necessary to carry out a financial needs analysis. This does not mean that respondent can ignore the provisions of the Code of Conduct for Financial Services Providers (The Code). The respondent must still advise his client on the appropriateness of the product and is obliged to draw client's attention to any risks in the investment.

   Secondly complainant agreed to a provision limiting respondent's liability if the former suffered damage as a result of advice given by respondent. However, the clause does not limit liability for gross negligence and further provides a limitation only where the respondent provided advice honestly, fairly, with due skill, care and diligence. The point to be made is that, in law, respondent cannot contract himself out of being subjected to the Act and The Code.

b) Then there is a sheet of paper on which respondent scribbled his notes of the consultation with complainant. Some of these notes were not legible. But what appears in the notes is the following:

   i) The rate of interest at the bank is 4 to 6%;

ii) A sketch depicting how Sharemax worked, this sketch is consistent with what complainant stated in his complaint;

iii) The interest will be 12 to 10% and the growth will be 10%;

iv) R100 000- 00 is how much client wants to invest.

The details of the notes are consistent with what complainant states. However, it appears that the notes are not comprehensive and lacks the details one would expect to find in a record of advice.

c) There is a copy of a joint statement by Willie Botha and Hermann Waschefort dated March 2011. This statement was circulated to all brokers and deals with the actions of the South African Reserve Bank. The statement also presents details of a scheme of arrangement being entered into by Sharemax. This statement was made after the scheme had stopped making payments to investors.

d) The next document worth noting is a standard Sharemax document titled “Compulsory coverpage (sic) for new investments”. The purpose is to record the documentation tendered in making a new investment in a Sharemax product. The document describes respondent as the Financial Adviser and Hertzog Coetsee as the Consultant. The importance of this document, for purposes of this determination, is that the document notes that “Relevant, fully completed and signed prospectus” is attached to the application. This cannot be true as it is not in dispute that complainant never received a prospectus. Respondent’s version is that Coetsee, the Sharemax consultant, explained the prospectus from his laptop computer. It is common cause that complainant never received, read and signed the relevant prospectus.

e) An important document is the application form, for linked units in Zambezi Retail Park Holdings Ltd. The document was signed by complainant on the 10 November 2008. The following clauses call for comment:

i) Clause number 1. records that complainant is making application for an allotment and issue of shares "subject to the prospectus". No prospectus was ever presented to complainant to enable him to make an informed decision.

ii) Clause 3. is a consent to attorneys Weavind and Weavind to invest complainant's funds in a separate interest bearing trust account in terms of section 78(2A) of the Attorneys Act. This created an illusion that complainant's funds will be safe in a trust account until transfer of the property took place. This is contradicted in the prospectus which states that the funds will be paid out to the promoter who will in turn lend the funds to the developer. It is not disputed that this was not drawn to the complainant's attention. Complainant never saw the prospectus.

iii) Clause 4. is a declaration by complainant that he "*personally received the complete and unaltered Prospectus prior to completing the application form."* It is an undisputed fact that this did not happen as complainant never received the relevant prospectus.

iv) As part of the application form there appears two pages of "Terms and conditions". Of interest is paragraph 15. This paragraph records that after the cooling off period has lapsed, an amount of 10% of the capital, deposited in the attorney's trust account, will be released to the promoter to make payment of commissions. The promoter also undertakes to "*eventually pay all commissions*". What is stated here contradicts respondent's version that complainant's funds will not be used to pay his commission. It is not in dispute that Sharemax Zambezi had no trading history

and no independent source of funds which could be utilised to pay commissions and interest. This much is stated in the prospectus and I must assume that respondent was aware of this. Respondents version is completely misleading.

v) Attached to the application form are certain schedules to the form, included is a schedule of material documents marked “A” to “M”. It is again, not in dispute that these documents were never made available to complainant. Included in this schedule is : “*H1 – H2 Deed of sale between Capicol (Pty) Ltd (Reg No 2007/010860/07) and Brookfield Investments 256 (Pty) Ltd (Reg No 2006/009236/07) for the purchase of the immovable property known as Sharemax Zambezi Retail Park and the addendum thereto”* . This is a crucial document and Respondent was under a duty to draw complainant’s attention to it. The truth is that the property, at the time the investment was made, was not purchased nor was it transferred to the promoter. A fact which respondent did not disclose to complainant.

vi) Another Sharemax standard document is “Sharemax Investments Risk Assessment On Product Information”. This document was signed by the parties. The document is drafted by Sharemax and supplied to all its brokers. The document is nothing more than a sham. It purports to be some form of risk assessment. It comprises of 6 questions which must be answered by ticking off “yes” or “no”. All the questions have absolutely nothing to do with risk on product information, which information is contained in the prospectus. One thing is clear, respondent did not explain the risks in this type of investment to complainant. Still less did he explain the risks in this particular product. There is absolutely no evidence that respondent explained to complainant that this product represented a risk to capital. Respondent was under a duty to explain the risks to complainant.

vii) The first question records that respondent explained that this product is a medium to long term investment of not less than five years. The reason I raise this is because on respondent's version, complainant initially invested for one year and because he was so happy, extended the investment and even made a new investment. This contradicts his version.

viii) A second set of similar documents is attached regarding the second investment in The Villa. Again I draw attention to the "Compulsory Coverpage.." . this time, the section dealing with receipt of the relevant, fully completed and signed prospectus is left unanswered. This comes as no surprise as it is undisputed by respondent that complainant did not receive a prospectus for The Villa. In fact, on respondent's own version, there was no explanation from Coetsee or any other consultant regarding the contents of the prospectus. This strengthens complainant's version that he did not make an informed decision to invest but merely trusted respondent.

xi) Then respondent also attaches a second "Compulsory Coverpage.." for The Villa, wherein it is confirmed that complainant received a relevant prospectus. This is not supported by the facts as there is no evidence of complainant ever seeing a prospectus. The application form is also attached and similarly acknowledges that the application is made in terms of the prospectus.

xii) The application form also contains terms and conditions, in particular I refer to paragraph 6.1.2. this is an important term and one will expect a reasonably competent FSP to explain it to client. This provides that the investors funds will remain in an attorney's trust account but that the investor "hereby" authorises the promoter to use the funds to invest in any property syndication and at the discretion of the promoter. This contradicts the undertaking to hold investor funds in trust until

the promoter takes transfer of the property. It is also illegal in terms of Notice 459. Respondent did not point this out to complainant.

xiii) Finally, I point out that a schedule of attached documents also appears in the application documents which refers to the purchase agreement with Capicol, this document was never disclosed to complainant.

E. THE LICENSE

[19] A matter for concern is that, according to the records of the FSCA, respondent was licensed under FSP No 15127. This license authorised respondent to sell only category 1 (one) financial products. This means he was not licensed to sell the Sharemax product, nor is there any evidence on record that he acted as a representative in terms of section 13 of the Act. Most of the brokers who sold Sharemax were section 13 representatives of USSA. If respondent was such a representative, he did not disclose it to Complainant nor does he say how he was supervised in selling these products. If respondent was not a representative then he acted illegally in selling the Sharemax product – refer to section 7 of the Act.

F. THE LEGAL FRAMEWORK

[20] This matter must be determined with reference to the following legal framework:

a) The provisions of the Act, in particular sections 7 and 16 (1) (a);

b) The provisions of the Code, in particular sections 2, 3, 7 and 8;

c) The common law relating to delictual liability; and

d) The common law relating to the contractual relationship between the parties.

G. THE ISSUES

[21] The issues for investigation and determination amount to this:

a) Did Respondent, in advising his client, conduct himself in terms of the General Code, in particular section 2; and

b) Did the Respondent actually comply with the provisions of 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).

c) Did respondent act in breach of his contract with Complainant; and

d) Did Complainant suffer loss and if so, what was the cause of the loss and the quantum thereof.

H. FINDINGS OF FACT

[22] This matter can be resolved, mainly, on the undisputed facts between the parties. They may be summarised as follows:

a) Respondent had previously advised complainant while he was an employee of ABSA Bank where complainant kept his account and made his investments, he therefore trusted respondent's advice;

b) Complainant made two investments of R100 000 each in Sharemax property syndications on the advice of respondent;

c) Respondent requested a Sharemax consultant, MR Coetsee, to explain the investment to respondent;

d) Respondent did not provide complainant with a prospectus, this in respect of both investments;

e) Respondent did not provide complainant with full information in plain language regarding the nature of the investments, respondent left it to Coetsee to do so;

f) Complainant never saw a prospectus;

g) Respondent did not explain the risks in the investment to complainant. On the contrary, respondent does not deny that he informed complainant that Sharemax was a safe investment and that he had invested his own funds into it;

h) Respondent informed complainant that Sharemax purchased property and rented it out and eventually sold it at a profit to the benefit of investors; respondent failed to point out that the Zambezi and The Villa were different from all the previous syndications marketed by Sharemax;

i) Respondent did not carry out a risk analysis nor did he carry out a needs analysis, respondent's record of advice confirms this;

j) Respondent did not, on both occasions, offer complainant any other or alternative financial products;

k) Respondent failed to point out to complainant that Sharemax, in respect of Zambezi and The Villa, had no trading history and no independent means to pay commissions and investor returns and that in effect commissions and monthly interest payments were to be made out of investor funds;

l) Respondent failed to point out that Sharemax did not own any property;

m) Respondent failed to point out to complainant that his funds were not going to be kept in an attorney's trust account pending transfer of the property and that investor funds were going to be used to make an unsecured loan to a developer;

n) There is nothing in respondent's client record to indicate why he considered Sharemax to be an appropriate investment. The only reason offered by respondent is that complainant wanted a higher return than what he was receiving from his existing investments;

o) In respect of the second investment, a year later, respondent provided no information to respondent. There was no prospectus and nor was there any explanation from anyone else;

p) Complainant lost his capital and there is no prospect that he will recover any part of it.

[23] Based on the above undisputed facts the following can be concluded:

a) Respondent had no interest in advising complainant about an appropriate investment for him; respondent gave advice for the sole purpose of selling the Sharemax products;

b) Complainant was then 78 years old and respondent expected him to have "done his homework". This does not explain why respondent failed to do his job as a trusted FSP. It is unfair for respondent to expect his aging client to research the product on his own, without access to the prospectus, and to make an informed decision and then expect to be paid a hefty commission of 6% on the capital;

c) Crucially, and on respondent's own version, the risks in the product were not explained by him. Instead respondent left this to Coetsee who was a Sharemax consultant. Therefore, respondent failed in his duty to provide complainant with independent advice not tainted by a conflict of interest. There are no probabilities favouring Coetsee actually explaining that this was a highly risky investment. On the probabilities, Coetsee was there for only one purpose, to sell the product. This was to the knowledge of respondent;

d) Had respondent provided the information detailed in the above paragraph, complainant would have been in a better position to make a decision to invest. On the probabilities, complainant would not have invested in such a high-risk investment, notwithstanding the higher returns.

I. APPLICATION OF LAW

[24] Bearing in mind the facts found to be proved and the conclusions to be drawn from them, the following findings can be made:

a) Respondent failed to act honestly, fairly, with due skill, care and diligence;

b) Respondent failed to act in the interests of his client and by his conduct compromised the integrity of the financial services industry. Respondent contravened section 2 of The Code;

c) Respondent failed to provide full and frank disclosure of all the material information about the Sharemax product;

d) Respondent failed to enable complainant to make an informed decision. Respondent contravened section 7 (1) (a) of The Code; and

e) Respondent failed to seek relevant information from complainant and failed to provide appropriate advice. Respondent failed to identify a product that was appropriate to complainant's risk profile and financial needs. Respondent contravened section 8 (1) (a), (b) and (c) of The Code.

[25] The fact that respondent was in breach of the Act and The Code does not mean that he is therefore liable for complainant's loss. There is a breach of contract as well as a claim in delict.

[26] Further, this office as well as the Board of Appeal has consistently found that there existed a contract between FSP and client. It was an express, alternatively implied term of the contract that Respondent, in carrying out his obligations, will comply with the provisions of the Act and The Code. For reasons already stated, respondent was in breach of this term. A consequence of this breach was the loss of complainant's capital.

[27] In a number of recent judgements in the high court, it was found that complainants claim is one in delict based on negligence. Once it is established that the respondent gave financial advice, two questions arise:

a) did the respondent comply with his legal duties towards the client; and

b) whether in terms thereof the respondent acted wrongfully and negligently.

[28] A reasonably competent FSP in the position of respondent would have done the following:

a) Carried out diligent research to become familiar with the nature of the Sharemax product he intended to sell;

b) Would have found out that the Zambezi and The Villa promotions were completely different to all the other property syndications Sharemax had promoted in the past;

c) As a basic step he was expected to read and understand the prospectus;

d) Made a point of understanding how Sharemax intended to pay his commission and investors returns bearing in mind that the latter owned no assets and enjoyed no trading history and did not have any independent means of making these payments (these facts are stated in the prospectus);

e) Would have noticed that contrary to what was initially stated in the prospectus, it then informs that investor funds will not be kept in trust but will be paid out to the developer at the discretion of the promoter (this too is stated in the prospectus);

f) Would have found out that investor funds were going to be lent to the developer at an interest rate of 14% and that there was no security for the loan (stated in the prospectus);

g) Would have called for and read the Sale of Business Agreement between the promoter and the developer (the agreement is in the schedules and annexures to the prospectus). Had he done so respondent would also have found out that 3% of the investor's capital was being paid out as "agents commission" and that was even before the money was lent to the developer, 10% was deducted by the promoter as administrative fees. The developer then paid the promoter 14% interest on the loan; a further 14% taken out of the capital. A reasonably competent FSP would have worked out that after 27% of the capital was deducted, investors were still going to be paid

12% interest on 100% of their capital. This was certainly not sustainable. (these facts are stated in the prospectus);

h) Would have noticed that this investment had to be regarded as a risk to capital and that no guarantees are given regarding the performance of the investment (again, stated in the prospectus); and

i) Would have noticed that the shares will not be easy to dispose of, the promoter offered no assistance in disposing of the shares and the onus was placed on the investor to find a buyer (also stated in the prospectus).

[29] Clearly by failing to read and understand the prospectus and failing to draw complainant's attention to the above information, complainant failed in his legal duties to his client.

[30] The respondent also acted wrongfully and negligently, he was under a legal duty to make a disclosure of these facts to complainant and if he did not acquire these facts, e.g. by not reading the prospectus, then he acted in negligent breach of that duty.

[31] The respondent must be judged by the standard of a reasonably competent FSP in the same circumstances. Then the inquiry must progress to the next question: would a reasonably competent FSP have advised complainant differently. It is overwhelmingly clear that a reasonably competent FSP would have read and understood the prospectus and would not have advised a 79-year-old man to invest in a manifestly high-risk investment where there was a prospect of losing all the capital. The SCA in Durr v ABSA Bank, Schutz JA stated as follows:

"The reasonable person has no special skills and lack of skill or knowledge is not per se negligence. It is, however, negligent to engage voluntarily in any potentially dangerous

activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity."

"Liability *in delict arises from wrongful and negligent acts or omissions. In the final analysis the true criterion for determining negligence is whether in the particular circumstances of the conduct complained of falls short of the standard of the reasonable person."*

I refer to the following decisions:

OOSTHUIZEN v CASTRO AND ANOTHER 2018 (2) SA 529 (FS)

ATWEALTH (PTY) LTD AND OTHERS v KERNICK AND OTHERS 2019 (4) SA 420 (SCA) at p529.

[32] In his defence the best point made by respondent is that he was not expected to foresee that the scheme would be found to have contravened the Banks Act nor could he have foreseen any delinquent conduct on the side of the directors of Sharemax. But that is not the test, even if one accepts that respondent could not reasonably have foreseen this, respondent was expected to make an evaluation of the product from the prospectus and give advice based on the client's requirements and tolerance for risk. He failed to do that and was therefore negligent, in this case possibly even dishonest, and he is accordingly liable for damages.

[33] Thus, both factual and legal causation was established.

J. REMEDY AND QUANTUM

[34] Complainant requested that all of his capital plus promised returns be paid to him. Complainant lost, in respect of both investments in Sharemax, his entire capital of R200 000. 00. I intend to make an order that this amount be repaid and will also award interest post service of this order.

K. THE ORDER

[35] Complaint is upheld.

1. Respondent is ordered to make payment to the complainant as follows:

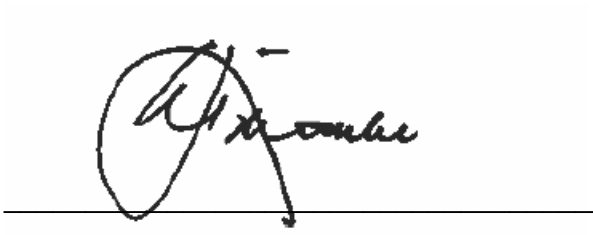
    1.1 The Respondent is ordered to pay the Complainant Payment of the amount of R200 000 – 00;

    1.2 Interest on the said amount at the rate of 7% per annum from a date 14 days from service of this order to date of payment.

    1.3 Upon such payment, the complainants is to cede his rights in respect of any further claims to these investments to the respondent.

2. Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 18TH DAY OF AUGUST 2020.



ADV NONKU TSHOMBE
OMBUD FOR FINANCIAL SERVICES PROVIDERS