IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 05505/12-13/ GP (1)

In the matter between:-

MARIE LOUISE NELL **Complainant**

and

JURIEN JORDAAN **Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')

A. INTRODUCTION

[1] The Complainant's father, having extensively invested in Sharemax Investments (Pty) Ltd. (Sharemax) in his own investment portfolio, approached the Respondent desirous of concluding a similar investment for his daughter.

[2] Sharemax, was a public property syndication company, purportedly engaged in renting, operating, and managing commercial properties for shops and offices. The company was incorporated in 1998 and was based in Pretoria.

[3] Investors were told that they would receive a return of 11.5% in the form of income and the said income was further guaranteed for the first year of the investment term (bar the first month of investment term).

[4] In September 2010 a newsletter was issued outlining the difficulties that the various property syndications under Sharemax were experiencing in paying out the promised income. In relation to The Villa project the news letter stated;

> *'In this instance, there are no interest payments possible* ***because the project has received no new capital influences, to either build or provide an income.*** *BUT there are several proposals on the table which will be shared with the shareholders as soon as finality can be reached. The project is almost complete with a series of excellent rental agreements, which will make the product valuable. (Emphasis mine)*
>
> *Everyone must execute a lot of patience so that the proposal presented to the shareholders can be taken. New directors can also be appointed at this point.*[1]*'*

[5] During October 2012, a request was made to the regulator to lapse the FAIS license issued to Sharemax.

[6] Sharemax and its syndication companies were investigated by the registrar's office and it was concluded that the funding models used by the entities were in contravention of the Bank's Act[2]. It should be noted that this was an

[1] Grandstand Newsletter, *Report on Sharemax and the entities under their management*, 22 September 2010

[2] Banks Act 94 of 1990. The manner in which the debentures were being issued, the South African Reserve bank found that Sharemax was illegally taking deposits from the public. Sharemax was ordered to repay all monies collected as it was seen to be performing the functions of a bank without the necessary registration.

administrative finding and was in no way a conviction of criminality of the persons involved in the scheme according to the registrar's office.

[7] Directives were issued to Sharemax for the repayment of funds collected from individual investors in September 2010. The South African Reserve Bank appointed independent fund managers to take control of the assets of Sharemax and its property syndication companies.

[8] During 2012 in a court sanctioned scheme of arrangement[3], the schemes were taken over by Nova Property Group Holdings Limited 2011/003964/06 (Nova) and investors (Sharemax) were issued with debentures or shares in Nova.

[9] A few interesting points to note;

9.1 around the time of the announcement of the scheme of arrangement in 2011, the executive directors of the erstwhile Sharemax Group, Dominique Haese, Rudi Badenhorst and Dirk Koekemoer held 43.2% of Nova's issued shares and are currently listed as directors of Nova[4].

9.2 The registered address for Nova Property is 105 Club Avenue, Waterkloof Heights, Pretoria which is the same building as the old Sharemax head office.

9.3 Frontier provides a range of administrative services to Nova and Centro Property Group manages the property portfolio on behalf of Nova. The

[3] As contemplated by section 311 of the Companies Act 61 of 1973
[4] http://www.frontieram.co.za/AboutUs.aspx

directors of Frontier are D Haese, D R Koekemoer, C J Van Rooyen and R N van Zyl (also formerly directors of the erstwhile Sharemax Group) M J Osterloh and the directors of Centro Property Group are E Grobler and M J Osterloh[5].

9.4 Frontier Asset Management sent out communique dated 6 August 2013 warning investors that those who brought complaints to the Office of the Ombud would lose their right to have their Sharemax investments converted into Nova debentures or shares.

B. THE PARTIES

[10] Complainant is Marie Louise Nell (Groenewald at the time of investment), an adult female teacher, whose details are on file in this Office.

[11] Respondent is Jurien Jordaan, an adult male member of Jurien Jordaan Advisory Services CC whose physical address is 213 Braam Pretorius Street, Wonderboom, Pretoria. The Respondent was authorised as a Financial Services Provider (FSP No. 4091) in March 2004. Respondent has since made a request to the regulator to lapse its license.

[12] At all times material hereto, the respondent rendered financial services to the complainant.

[5] http://www.frontieram.co.za/AboutUs.aspx

C. COMPLAINT

[13] On 06 February 2009 the complainant's father requested that a R50 000 investment be made on behalf of the complainant into a Sharemax investment known as The Villa Retail Park Holdings Ltd ('the Villa'). The respondent executed the requested. Consequently unsecured shares and securitised acknowledgment of debt certificates were issued to the Complainant on 29 April 2009.

[14] On 02 June 2009, the respondent contacted the complainant and persuaded her to make a further investment of R50 000 in The Villa. The respondent had been approached by another client of his who no longer wished to possess the shares and was willing to sell the shares at less than the original purchase price.

[15] A total investment of R100 000 was made into Sharemax, The Villa by the respondent on behalf of the complainant.

[16] The complainant maintains that no disclosures regarding the risk associated with such an investment were ever made to her.

D. RESPONDENT'S VERSION

[17] The crux of the respondent's version is as follows:

17.1 Respondent maintains that he was a representative of USSA at the time of the investments and as such is of the belief that the complaint should first be directed to USSA.

17.2 Unlisted Securities South Africa, (USSA) was established by Gerhardus Rossouw Goosen while he was a director of Sharemax. Independent brokers like the Respondent - who were licensed in their own right as Financial Services Providers, but lacked the correct license type - were able to market and sell unsecured debentures as representatives of FSP Network Ltd, trading at the time as USSA. FSP Network was finally liquidated in 2013.

17.3 Respondent further maintains that he did not advise the complainant to invest in Sharemax. To this end he states "*Sharemax is often bought by the investor not sold by the advisor. In this case I believe this statement is very accurate…*"

17.4 Respondent avers that the Groenewald family as a whole were already invested in Sharemax before his initial meeting with them.

17.5 With regards to the first investment made on 09 February 2009, the respondent alleges that he had never met nor interacted directly with the complainant and instead dealt strictly with her father who advised that he would have the complainant complete the forms necessary for the investment.

17.6 The respondent contends that with regard to the first investment made by the complainant, the complainant's father decided to invest in Sharemax on her (complainant's) behalf. He states that he was of the opinion that the complainant's father was very knowledgeable about the investment and that he (respondent) merely acted as an agent who

executed the complainant's investment and thus cannot be held accountable for that investment.

17.7 With regards to the second investment made 02 June 2009 the respondent concedes that he had in fact contacted the complainant with the proposal to further invest in Sharemax.

17.8 Respondent was prompted to contact the complainant following one of his client's urgent request to sell 100 shares held in Sharemax, The Villa and was subsequently willing to take a loss on the investment provided he was able to off - load the shares.

17.9 Respondent maintains that the circumstances surrounding the second investment (namely, that an investor desperately wanting to sell his Sharemax shares at a loss) should have alerted the complainant to the possibility of the risk of losing her invested capital.

17.10 In defence of his decision to nevertheless continue to sell the shares the respondent maintains that the factors he relied upon in assessing the viability of the Sharemax investment were;

a. the visible progress with the construction of The Villa;
b. the list of supposed tenants that had signed lease agreements[6]
c. as well as his belief that property is always a secure investment to make.

[6] The respondent attaches an extensive list of supposed tenants but attached no actual signed lease agreements

17.11 In summation, the respondent completely absolves himself of any responsibility for the first investment made as he maintains that the complainant's father advised her in that instance and he merely actioned his request. With regards to the second investment the respondent acknowledges that he initiated the investment but did not feel it was necessary to render advice as he assumed that the complainant and her family were already very familiar with Sharemax and its workings.

E. ISSUES

[18] The issues to be decided are:

18.1 Whether the respondent rendered financial services in a manner which is not in compliance with the FAIS Act and the General Code of Conduct ('the Code')

18.2 Whether the respondent caused the financial prejudice suffered by the complainant.

18.3 Quantum

F. DETERMINATION

[19] It is prudent to deal at the onset with the respondent's submission that the complaint first be directed to USSA as he was merely acting as their representative when the financial service was rendered.

[20] Regarding whether or not the respondent may be held liable for the financial service rendered, attention should be had to the definition of a representative.[7]

[21] The definition of a representative assumes that a person acting as a representative has to exercise the relevant final judgment; decision making and deliberate action inherent in the rendering of a financial service to a client.

[22] In the first Appeal decision[8] of the *Moore versus Black* determination, the Appeal Board stated as follows;

In effect a *"representative" executes the very same acts as are expected from the provider when operating alone with the exception of when a representative either:*

1. *Acts on behalf of the provider;*
2. *Subject to the provider concerned taking responsibility for these acts*

Apart from these two (2) qualifications, a representative acts as if it were a provider.

…The provider is directly regulated by the FAIS Act and by the Registrar. But representatives are, apart from being regulated by the FAIS Act, in effect regulated by the overseeing provider rather than by the Registrar. Such provider clearly has a discretion on how precisely to exercise responsibility over a representative but should ensure in the agreements with the representative that

[7] Section 1 Financial Advisory and Intermediary Services Act 37 of 2002 'representative 'means any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial service provider, in terms of conditions of employment or any mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in subsidiary or subordinate capacity…

[8] In the Appeal Board of the Financial Services Board, John Alexander Moore and Johnsure Investments CC / Gerald Edward Black, 15 January 2013 at para 59 and 61

the responsibility covers all aspects, including those duties and obligations imposed by the FAIS Act and the Regulations pertaining to them. The fact that the representative "acts on behalf of" the provider also means that in law, the provider may be held accountable for the acts and omissions of his representative and thus should be regarded as a co-respondent in the event of negligence on the part of the representative."

[23] The same defence was dismissed by the Board of Appeal in the second Black v Moore Appeal[9]. Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lied not with the appellant as a representative but rested solely with the financial services provider. In dismissing the argument, the Board concluded, *'the effect of the Exemption Notice thus allows a representative (due to his minimum experience) to market products subject to a supervisor's guidance. Apart from this exemption, he has to comply with the Code of Conduct.*'

In light of the above it can be said that both USSA and the respondent would have been jointly and severely liable for the loss suffered by the complainant had USSA still been in operation.

[24] Section 13(2)(b) of the Act[10] states:

"An authorised financial services provider must take such steps as may be reasonable in the circumstances to ***ensure that representatives comply with***

[9] Decision handed down on 14 November 2014, paragraphs 18 to 23
[10] Financial Advisory and Intermediary Services Act 37 of 2002

any applicable code of conduct *as well as with other applicable laws on conduct of business*. (Emphasis mine)

[25] It is clear that there is a duty imposed on not only the provider but also the representative to comply with the provisions of the FAIS Act and Code of Conduct.

[26] The prevailing theme of the respondent's responses to this Office is his incessant desire to completely disassociate himself from accountability, choosing instead to hide behind the veil of "no advice rendered". This is made abundantly clear when he states;

'*Mr Groenewald told me to leave his daughter's application form with him and he would discuss it with her and get her to sign the relevant forms. He did this and he saw to it that I got the application together with the deposit****. I therefore did not speak to his daughter I only spoke to him. He gave her the monies and he decided where she should invest it.*** (Own emphasis)

[27] Section 8 (1) (a) (b) and (c) of the General Code of Conduct states:

"A provider other than a direct marketer, must, prior to providing a client with advice

(a) 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 provider to provide the client with appropriate advice.

(b) Conduct an analysis, for the purposes of the advice, based on the

information obtained;

(c) 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 provider under the Act or any contractual arrangement".

[28] Viewed against the backdrop of section 8 (1) (a) (b) and (c) of the General Code of Conduct of Financial Service Providers (the Code), there is an obligation on the financial service provider to first make enquiries to match the appropriateness of the financial product to the client's risk profile and financial needs and circumstances. No such enquiries were made by the respondent.

[29] There are various risks inherent in the Sharemax Villa investment, which would have needed to have been disclosed to the complainant. On page 6 of Prospectus 19 of the Villa investors are warned that the shares on offer are unlisted and should be considered as a risk capital investment. Investors are therefore at risk as unlisted shares are not readily marketable and should the company fail (as it subsequently did) this may result in the loss of the investment to the investor. No such disclosures were made to the complainant.

[30] The respondent did not establish the complainant's risk tolerance and therefore was not in a position to assess whether or not the investment was suitable to complainant's circumstances.

[31] Section 8 (1) of the code, provides amongst others that providers must first get to know their client in order to render appropriate advice to them. This includes understanding the client; their needs and circumstances. Information must be gathered, analysed and only then is a provider in a positon to make an

appropriate recommendation.

[32] The respondent, by his own admission, chose to ignore what is expected of a competent financial service provider as set out in the General Code. His conduct of rendering the financial services without complying with the General Code, especially sections, 8 (1) (a) to (c), 7 (1)[11] and 7 (2)[12] indicates a deliberate dereliction of duties by the respondent.

[33] The record of advice submitted by the respondent in his response to this Office reveals very little in the way of an attempt to actually solicit detailed information from the client. Information required to comply with sections 9 (1) (a) to (c) of the Code[13]. It instead only contains the client's name and amount to be invested. All other sections have a line through them and the document is not signed by neither the complainant nor respondent.

[34] With regards to the second investment the respondent also provides no proof that he disclosed to the complainant that she could potentially lose all her capital. The complainant was not only under the impression that her capital was guaranteed, she also believed that at the end of the investment term she would

[11] This section speaks to the duty incumbent on a provider to provide reasonable and appropriate general explanation of the nature and material terms of the relevant transaction to a client, and make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision. The section confers a stricter standard of care with regards to investments in that it mandates that concise details of the manner in which the value of the investment is determined; including concise details of any underlying assets or other financial instruments. Concise details regarding the extent the product is readily realisable or the funds concerned are accessible amongst other obligations are also placed on a provider.

[12] No provider may in the course of the rendering of a financial service request any client to sign any written or printed form or document unless all details required to be inserted thereon by the client or on behalf of the client have already been inserted.

[13] The General Code of Conduct places on obligation on providers to record a brief summary of the information and material on which the advice was based; the financial products considered; the financial product/s recommended with an explanation of why the product/s selected satisfy the client's identified needs and objectives.

realise 30% capital appreciation. To this end the respondent offers no credible defence outside of the statement that the complainant ought to have appreciated the inherent risk of loss of capital from the circumstances of the very transaction he was assisting her in concluding (purchasing shares at below purchase price from a seemingly unsatisfied investor.)

[35] There is no indication from the respondent's response that he took reasonable steps to seek from the complainant available information regarding her financial situation and objectives. Without having gone through the steps as demanded by section 8, respondent was in no position to provide appropriate advice to the complainant.

[36] Of notable concern, from the response submitted by the respondent, is the fact that it is particularly evident that he himself was not adequately knowledgeable on the workings of the investment and the associated risks. Comments regarding the security of property investment point to this. The respondent fails to understand that he was not selling property to complainant but in fact soliciting loans in the form of debentures to advance to the developers to complete construction of The Villa. Respondent could not appreciate that complainant's investment was not protected in any way as clearly set out in the prospectus. With a little bit more work and research respondent would have appreciated that investors had no interest whatsoever in the entity that owned the Villa immovable property. Their interest resided in the public company they had financed. The entity that owned The Villa was a separate entity altogether.

[37] Essentially the investment sold to the complainant amounted to nothing more than the promises of the promoters of Sharemax. Promises that were never

kept, as it turned out.

G. CAUSATION

[38] Section 7(1) (c) (xiii) requires that the provider, provide full and appropriate information as to ‘any material, investment or other risks associated with the product’.

[39] By the respondent’s own admission none of the material risks were pointed out, nor explained to the complainant as he felt it unnecessary given her father’s assumed “knowledge of the investment”. Save for the haphazardly completed record of advice there is no indication that a copy of the disclosure documentation; Sharemax marketing material; Prospectus or any other sources of important information were given to the complainant never mind explained to her. It is glaringly apparent that there was no proper evaluation of risk was conducted.

[40] Respondent states that the complainant’s father advised her with regards to the first investment and as a result of which no analysis was necessary. This cannot be viewed as anything more than a feeble excuse to justify what I would term “product peddling”. The respondent did not concerned himself with complying with the most basic requirements of the FAIS Act such as, section 8 (1) (a) of the General Code, which requires that a provider ‘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 provider to provide the client with appropriate advice;’ and 8 (1) (b) which requires an analysis to be conducted, based on the information obtained.

[41] With regards to the first investment the respondent maintains that he passed on the necessary documentation to the complainant's father and it was returned after submission to the complainant by her father. Where a client has not provided the information requested or in the light of circumstances surrounding the case there was not sufficient time to do so an exception is allowed in terms of section 8 (4) of the Code. The client must however be advised that there may be limitations on the appropriateness of the advice and that the client should take particular care to consider on its own whether the advice is appropriate.

[42] There is no indication of any urgency or shortage of time, either on complainant's or respondent's version, and similarly no indication that complainant was either expressly requested to or failed to provide the required information.

[43] The respondent did not at any stage prior to recommending the investment take steps to ascertain whether the product recommended was suitable to the complainant's circumstances thus the suitability of the product could not have be determined, or even considered, at the time that investment was sold.

[44] The duty rests on the respondent as the expert to advise the complainant as his client, which he failed to discharge. The complainant was neither placed in a position to make an informed decision as required by section 3 (iv) of the Code nor suitably advised.

[45] This effectively amounts to a failure on the part of the respondent to; '*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;[14]*'*

The Code clearly envisages that the 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 of the General Code require human intervention;

[46] Thus simply offloading shares or strictly executing the instructions of the complainant's father without any application of the mind or attempt to properly undergo the financial planning process as provided for in the General Code, beforehand is in a violation of the Act and Code.

[47] In addition section 9(1) of the Code requires that a provider maintain a record of the information on which the advice was based as well as the products considered with an explanation of why they are likely to satisfy client's needs. As already discussed earlier, no such record exists, instead all that was submitted *in lieu* of such record was a document with the complainant's name and amount invested.

[48] Ultimately it was the respondent's failure to render advice prior to rendering the

[14] Section 2 of the General Code of Conduct for Financial Service Providers

financial service that caused the loss the complainant suffered.

H. FINDINGS:

[49] The respondent contravened section 2, 7, 8 and 9 of the code in that:

a. The respondent failed to act with due skill, care and diligence, and in the interest of the complainant when he advise the complainants to invest in a product without first advising her.

b. The respondent was unable to produce records to demonstrate the basis on which he considered the high risk Sharemax investment suitable to complainant's circumstances.

c. The respondent failed to disclose the risk inherent in The Villa investment.

[50] Accordingly, in light of all of the above I find in favour of the complainant.

I. QUANTUM

[51] The complainant invested R100 000 in the Villa. There is no question that it is the respondent's non-compliance with the code and failure to provide appropriate advice before the financial service was rendered which led to the complainants suffering financial prejudice. I therefore intend to make an order in the amount of R100 000**.**

J. ORDER

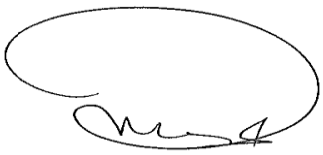
[52] In the premise the following order is made:

1. The complaint is upheld;

2. Respondent is hereby ordered to pay to complainant the amount of R100 000.00;

3. Interest at the rate of 9%, pa from the date of this order.

DATED AT PRETORIA ON THIS THE 16th DAY OF MARCH 2016.



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OMBUD FOR FINANCIAL SERVICES PROVIDERS