IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: 4827/2013

In the matter between:

SHANE ALAN SYMONS N.O	**First Plaintiff**
JOHANNA ALETTA SYMONS N.O	**Second Plaintiff**

and

THE ROB ROY INVESTMENTS CC t/a	**Defendant**
ASSETSURE	

ORDER

The claim is dismissed with costs.

JUDGMENT

Delivered on: 10 December 2018

PLOOS VAN AMSTEL J

Introduction

[1] The plaintiffs in this matter are the trustees of the Symons Family Trust. They seek damages against the defendant, who is their former financial adviser and investment broker. The basis of the claim, as pleaded, is that on the defendant's advice the trust invested a total amount of R5 million in a concern known as Sharemax Investments (Pty) Ltd ('Sharemax'), and lost the whole of its investment when the scheme collapsed.

[2] The defendant is The Rob Roy Investments CC, trading as Assetsure, and was represented in its dealings with the trust by its sole member, Mr Peter Griffin. He was at the time registered with the Financial Services Board as a financial services provider.

[3] Mr Symons and his wife are the two trustees of the trust. He had a successful career, starting as a shelf packer in Pick and Pay in 1990, then a sales representative, later a sales manager and later a 50 % shareholder and director of a sales and merchandising company. He and his partner sold the business in 2009. This left Mr Symons well off financially, so much so that he planned to retire early.

[4] Mr Griffin became Mr Symons' financial adviser in 2006. For the sake of brevity I shall refer to them by their surnames. Griffin got to know Symons well, and their relationship developed into something more than the ordinary client relationship. He said Symons was an astute businessman. He managed his own share portfolio and occasionally boasted about its performance. Griffin regarded him as a wealthy man.

[5] During the period 2006 to 2008 Symons, either personally or on behalf of the trust, made a number of investments through Griffin. These included an investment of R750 000 in a company that owned fully let buildings in the United Kingdom; life insurance on two occasions; an investment of R1 million with Investec; and a further R1,25 million in an international property investment.

[6] During May or June 2009 Symons received an amount of about R7 million, which represented one half of his share of the selling price of their business. He was to receive the balance in two later instalments. He mentioned to Griffin that he intended to retire early and that he was interested in an investment which would produce a monthly income.

[7] Griffin mentioned the Sharemax investment to Symons on the phone, and they agreed to meet to discuss this further. When they met he explained to Symons that the Sharemax product was an investment in a shopping mall which was being constructed in Pretoria, that he would receive 12, 5% interest from the date of the investment, and after the occupation date a monthly payment from the rental income, which would escalate every year. He left some documents regarding the scheme with Symons.

[8] A week or two later Symons phoned him and said he had made up his mind and wanted to invest an amount of R2 million in Sharemax. They met again on 24 June 2009. Symons signed a number of documents relating to the investment and gave Griffin a cheque for R2 million, made out to a firm of attorneys who represented Sharemax.

[9] Symons made a further investment of R1 million on 12 November 2009. He received regular interest payments on the two investments, and on 14 July 2010 invested a further amount of R2 million. He received no interest payments in respect of the third investment, and the monthly payments in respect of the first two investments also stopped.

[10] When Griffin made enquiries with Sharemax as to what was going on he was told that the Reserve Bank had raised a problem but that they were dealing with it. Griffin was in the same boat as he had invested an amount of R600 000 with Sharemax. Part of this was his money and the rest belonged to family members.

[11] It later transpired that the Reserve Bank had intervened as it regarded the funding model as the unlawful taking of deposits from the public, and directed Sharemax to change its funding model. It was not able to do so. As a result it was

unable to raise further money, the scheme collapsed and construction on the shopping mall came to a halt. It remains unfinished, and it was not disputed before me that it is not likely to be finished.

The Claim.

[12] The case pleaded by the plaintiffs was as follows. In terms of the contract between the parties the defendant undertook to advise the trust with regard to a range of low risk investments; the defendant would execute its mandate with the level of skill and diligence expected of advisers such as the defendant, and which the defendant represented that it possessed; and the defendant would not recommend any investment to the trust until it had satisfied itself that it was a low risk investment.

[13] The plaintiffs further pleaded that during 2009 and 2010 the defendant advised and persuaded them to invest in a concern known as Sharemax Investments (Pty) Ltd and represented to them that this was a low risk investment. He also advised them that in accordance with the prospectus issued by Sharemax they would receive an initial income yield of 11% per annum and a guaranteed return of the capital invested by them, after five years. Then followed an averment that, independent of the prospectus, the defendant advised them that the returns were guaranteed and that there was no risk involved in making the investment.

[14] The plaintiffs pleaded that the defendant breached its contractual obligations by advising them to invest in Sharemax in circumstances where the investment carried a substantial risk as the funds were intended for investment in a syndicated property development; by advising them that the returns were guaranteed when this was not the case; by failing to properly investigate Sharemax and its business dealings or to properly understand Sharemax's prospectus and proposed business model; by failing to exercise an independent judgment regarding the propriety of the Sharemax business and the contents of its prospectus; and by failing to exercise the requisite level of skill and diligence that it had represented to the plaintiffs that it possessed.

The Issues

[15] In considering whether the defendant has been shown to be liable for the loss suffered by the plaintiffs, I need to consider the nature of the investment and the risks that attached to it; whether the defendant breached its contractual obligations in any way; and if so, whether such breach can be said to be the cause of the plaintiffs' loss. The issue of causation seems to me to include a consideration of why the scheme failed.

The nature of the investment.

[16] The scheme concerned a shopping mall which was being constructed in Pretoria, known as The Villa Retail Centre. It consisted of a property syndication promoted by Sharemax, with investors purchasing units in a company known as The Villa Retail Park Holdings Limited ('Holdings').[1] According to the documents given to Symons the project value was approximately R3 billion and was financed with investments from the public by means of a series of prospectuses.

[17] The first prospectus given to Symons related to a public offer by Holdings for subscription for 75,000 linked units in the company, each linked unit consisting of one ordinary par value share and one unsecured floating rate claim, linked together in a unit of R1000. The amount sought to be raised pursuant to this prospectus was the sum of R75 million. The prospectus was the eighth one, and the evidence was that all the previous prospectuses were fully subscribed.

[18] The land on which the shopping mall was being constructed was owned by a company known as Capicol 1 (Pty) Ltd. In terms of the scheme Capicol would sell the shopping mall to a company known as The Villa Retail Park Investments (Pty) Ltd ('Investments'), the shares in which were owned by Sharemax. Holdings, in turn, would acquire the shares in Investments from Sharemax. The investors would own shares in Holdings, together with the claims linked to those shares. Once the

[1] The averment in the particulars of claim that the plaintiffs invested in a concern known as Sharemax Investments (Pty) Ltd was incorrect. Nothing turns on this as it was common cause before me that the investment was as I describe it in the judgment, and the trial proceeded on that basis.

shopping mall was occupied by tenants, the rental income would provide a monthly income to the investors.

[19] To this end Investments concluded a Sale of Business Agreement with Capicol on 15 January 2009, in terms of which it bought the shopping mall as a going concern (Capicol was the owner of the land and the developer) for a 'projected amount' of R2, 9 billion, on the basis that the actual purchase price would only be calculated and adjusted 30 days after the occupation date, once the income stream had been determined.

[20] In terms of the prospectus it was envisaged that investors (in option A) would receive a rate of return of 12, 5% from the date of the investment until the occupation date, and 11% for the first year after the occupation date. There were projected escalations for the years that followed.

[21] The second investment by the plaintiffs was substantially the same as the first one. The third investment differed in the sense that the shares purchased by the investors were in a company registered as The Villa Retail Park Holdings 2 Ltd, had an issue price of R1000 per share, and the shares were not linked to loans as in the case of the first two investments. The difference is not material for present purposes.

The Risks.

[22] It was not disputed before me that the investment was a high-risk one. This in itself does not mean that investing in it was reckless or irresponsible, as this depended on the particular circumstances of the investor, its objectives and the context and background of the investment itself. A risk which is acceptable to some may not be acceptable to others. I should add that there was disagreement amongst the expert witnesses with regard to the extent and materiality of the risks inherent in the scheme.

[23] Mr Prakke, a chartered accountant with substantial forensic experience, testified as an expert witness for the plaintiffs. He is very familiar with Sharemax as he had made a study of it as an expert witness for the late Mr Deon Basson, a

financial journalist who was sued by Sharemax for defamation. Basson passed away before that matter was heard. I should add that Prakke is not a financial services provider.

[24] He expressed several criticisms of the investment, which he described in the summary of his evidence as an 'above average' investment risk, and in his evidence as 'higher than high'. He criticised the obligation to pay interest to the investors before there was a rental income stream, and said this could only mean that the interest was paid out of invested capital. He contended that the vacancy factor budgeted for was too low; that the projected rental per square meter was too high; that the syndication structure was illegal in that it contravened the Banks Act 94 of 1990; that the upfront commissions and other expenses were too high; that the public companies involved were insolvent; that the projected returns were not feasible; that the prospectus omitted material information; that the defendant should have performed a due diligence investigation and explained the cost of the units to the plaintiffs; and that the defendant failed to act in accordance with its professional obligations and the requirements of FAIS[2].

[25] Mr Throssel, an investment manager, also testified for the plaintiffs as an expert witness. He regarded the upfront commissions and fees as exorbitant; he thought they would affect the independence of the defendant as a financial services provider and would motivate it to sell the investment in preference to other investments; he regarded the returns promised to investors as exceptional; and he expressed the view that Griffin failed to investigate the investment properly and thus did not exercise the required level of skill and diligence.

[26] Mr Cohen, who testified for the defendant as an expert witness, said the fact that the company was not listed was neither here nor there. He said many property syndications and developments are done by unlisted companies, and this on its own was not a matter of concern. With regard to the source of the money which was required to make monthly payments to the investors, he said according to the prospectus the invested funds were deposited by the attorneys in an interest-bearing

[2] The Financial Advisory and Intermediary Services Act 37 of 2002.

trust account, and in addition, in terms of the sale of business agreement, Capicol was obliged to pay interest to Investments on the amounts advanced to it as part of the purchase price. He said this was a common practice, and was designed to assist the developer with its cash flow. The fact that the successful completion of the shopping mall was dependent on further investments did not concern Cohen. He said at the time investments in retail property were very popular and all the earlier prospectuses issued by Sharemax in respect of The Villa were fully subscribed. He thought that but for the intervention by the Reserve Bank the shopping mall would have been completed as envisaged, and produced a rental income. He did not regard the projections in the prospectus as unrealistic and said economic conditions would have determined how well the shopping mall did and what returns it produced. He did not agree that the public companies promoted by Sharemax were insolvent and pointed out that the claims by the investors were subordinated. He disagreed that it is expected of a financial services provider to perform a due diligence exercise, within the meaning of that expression in mergers and acquisitions. He expressed the view that a financial services provider should do a reasonable investigation, and is entitled to have regard to the track record of the company, the people involved and the information in the prospectus.

[27] Neither Cohen nor Mr Swanepoel (who also testified as an expert witness for the defendant) regarded the information in the prospectus as inadequate, and neither of them regarded the commission structure as exorbitant or a negative influence on the financial adviser’s independence.

[28] Swanepoel expressed the view that a reasonable financial services provider would have taken into account the reputation of the Sharemax group of companies; the sound property investments which Sharemax had offered since its inception; would have regarded the probability of Sharemax failing to be negligible; that there was no indication in the prospectus or any other document that the investment scheme was illegal in any way; would have had regard to the involvement of reputable professional people; that a financial services provider is wholly dependent on information in the public domain, and is not required to act as an amateur detective and investigate the truth of public statements by reputable professional people and the representatives of the investment schemes.

Griffin

[29] Griffin testified that he mentioned the Sharemax investment to Symons because he knew that he liked investments in property, and it would produce an attractive monthly income. He had attended a number of lectures and presentations about Sharemax, and had to write an examination on it. He was impressed with its track record and the prospectus, and also by the involvement of professional firms of attorneys, auditors and valuers.

[30] He testified that after the first meeting with Symons about Sharemax, he left with him a brochure concerning the investment and a copy of the prospectus. Symons testified that he only received a copy of the prospectus on 24 June 2009, when he signed the documents. I prefer Griffin's evidence in this regard. It is not disputed that he already had copies of the prospectus before this meeting, and it seems probable to me that he would have left a copy with Symons. On the front page of the prospectus appears, in Symons's handwriting, the words 'Invested 2.0 m' and the date '23/6/2009'. This was the date on which Symons wrote out the cheque for R2 million, and the day before the meeting on which he signed the documents. If he made that entry on 23 June 2009 then it is obvious that Griffin must have left the prospectus with him after the first meeting. In any event, I see no reason to prefer Symons' evidence to that of Griffin. Further, in a request for further particulars for trial the plaintiffs were asked whether they admitted or denied that copies of the prospectuses were furnished to them prior to the conclusion of the agreements. The answer was that this was admitted. A similar admission was made by the plaintiffs in terms of the pre-trial procedures.

[31] The brochure contained an overview of the project and the investment opportunity. It stated that there was a big demand for lettable area and that 50% of the centre was signed up within three months of its introduction. A large amount of these tenants were said to be national tenants, with Shoprite Checkers the anchor tenant. The brochure listed a large number of other tenants, which included many well-known national businesses, including the four big banks.

[32] A caution was expressed in the brochure in the following terms: ‘It is important that a potential investor reads the relevant registered prospectus carefully and makes himself/herself acquainted with the opportunity and the risks of such an investment’.

[33] In the ‘Investment Summary’ contained in the prospectus it was stated that the Public Property Syndication Association (PPSA), supported by the South African Property Owners Association (SAPOA), had laid down a strict code of conduct to protect the rights of individual investors. It was recorded that Sharemax was a member of the PPSA and registered with the Financial Services Board as an Authorised Financial Services Provider.

[34] In the opening paragraph of the prospectus appeared the following: ‘The Registrar of Companies has scrutinised the information disclosed in this Prospectus. The information disclosed complies with the statutory requirements. The Registrar of Companies does not express a view on the risk for investors or the price of the share. However, 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’.

[35] In the document on the letterhead of Unlisted Securities South Africa (USSA), which was signed by Symons at the second meeting, appears the following under the heading ‘General Investment Risk and Tax Considerations’: ‘The properties are syndicated in a company structure. The investor purchases a unit which consists of ordinary shares and debentures (a debt obligation). The units are purchased and sold as a whole and its parts cannot be purchased or sold separately. With property syndication investments there is a risk that both the capital and the income could not materialise. A property syndication investment is not liquid as the ability to transfer the units (shares and debentures/claims/loan account) is restricted by the absence of a market for those units/shares’.

[36] The document also contains the following under the same heading: 'The product supplier (entity whose shares/units/debentures are sold via the prospectus) is subject to general risks, including changes in interest rates, inflation rates, level of tax, taxation law and accounting practices etc. It is also a newly formed company without any trading history which can be used to evaluate the likely performance of the product supplier and its ability to achieve its objectives. In cases where loan finance has been advanced to a developer, there is the risk that the developer may default on its obligations or produce insufficient profits to make any payments of returns of capital or other amounts due to the product supplier'.

[37] It is recorded in the document that the investor acknowledged, understood and confirmed that the repayment of the capital and or the income was not guaranteed, unless it was explicitly stated in the prospectus that it was guaranteed; that the performance of the property syndication investment was not guaranteed; and that the units/shares of the property syndication investment were unlisted and should be considered as a risk capital investment. The words 'NOT GUARANTEED' appear on the signature page in capital letters, and the words '**UNLESS IT IS EXPLICITLY STATED IN THE PROSPECTUS THAT IT IS GUARANTEED'** in bold capital letters. Mr Symons signed an identical document on 14 July 2010, when he made the third investment.

[38] In one of the documents signed by Symons at the second meeting, headed 'Confirmation of Advice', appeared the word 'Guarantees' underneath the detail of the investment, with the words 'Yes/No' next to it. The word 'Yes' was deleted, leaving 'No' as the answer. The same applies to the documents which he signed on 12 November 2009 and 14 July 2010, when he made the second and third investments.

<u>The Alleged Breach.</u>

[39] The breach pleaded was that the defendant had advised the plaintiffs to invest in Sharemax in circumstances where such an investment carried a substantial risk as the funds invested were intended for investment in a syndicated property development; advised the plaintiffs that the income and capital returns were

guaranteed; failed to properly investigate Sharemax and its business dealings or to properly understand Sharemax's prospectus and proposed business model; failed to exercise an independent judgment regarding the propriety of the Sharemax business; and failed to exercise the requisite level of skill and diligence.

[40] The plaintiffs also pleaded that it was a material term of the agreement that the defendant would not recommend any investment until it had satisfied itself that it was a low risk investment. In the letter of demand from the plaintiffs' attorneys, dated 2 November 2012, the attorney said the following: 'Our client informed you that he wished to invest in low risk investments, and initially those instructions were adhered to. However, and commencing in 2009, you convinced our client to invest contrary to his risk tolerance by persuading him to invest in Sharemax Investments (Pty) Ltd.'

[41] This was not Symons' evidence. He said the international property investments which he made in 2006 and 2008 were classified as of moderate risk. It was not his evidence that he at any time told Griffin that he only wanted low risk investments. Nor did he say that Griffin represented to him that Sharemax was a low risk investment, as is alleged in the particulars of claim.

[42] The averment that the defendant breached its contractual obligations by advising the plaintiffs to invest in Sharemax in circumstances where such an investment carried a substantial risk 'as the funds invested were intended for investment in a syndicated property development' makes little sense as Symons understood that he was investing in a syndicated property development.

[43] Griffin denied that he told Symons that the income and capital returns were guaranteed. In the application form which Symons signed he had to make an election between Options A and B. Option A was stated to be an Income Plan, while Option B was stated to be a Guaranteed Plan. In the prospectus Option A referred to a projected rate of return of 12, 5% from the date of the investment until the occupation date, and thereafter a projected rate of return of 11%, which was guaranteed for a period of one year after the occupation date. Option B referred to a guaranteed return of 6% from the occupation date, which rate would escalate each year thereafter by 3% per annum during the first five years. The guarantee in respect

of returns was for a period of five years. The projected rate of return from the date of investment until the occupation date was 9%. In the case of an original investor who elected Option B and who sold his units after sixty months, using the services of the Promoter, and to a purchaser introduced by the Promoter, would be guaranteed the return of his capital plus his proportionate share of any growth. There was no guarantee in respect of Option A.

[44] Symons selected Option A, presumably because of the higher initial rate of interest. The documents to which I have referred made it clear that the repayment of the capital and the income was not guaranteed, and I see no basis for finding that Griffin told Symons otherwise.

[45] I deal now with the allegation that Griffin failed to properly investigate Sharemax and its business dealings or to properly understand Sharemax's prospectus and proposed business model; that he failed to exercise an independent judgment regarding the propriety of the Sharemax business; and that he failed to exercise the requisite level of skill and diligence.

[46] The allegation that Griffin failed to exercise an independent judgment can be easily disposed of. It was based on the fact that he received an upfront commission of 6%. The suggestion was that because this was higher than the norm at the time he would have recommended this investment in preference to others. Griffin accepted that the commission may have been somewhat higher than in the case of other lump-sum investments, but said he could have earned more commission by selling investments in unit trusts or annuities. Neither Cohen nor Swanepoel regarded the commission as excessive. I do not consider that the evidence justifies a finding that the commission of 6% compromised Griffin's independence.

[47] With regard to Sharemax itself, Griffin said he was aware that Sharemax Investments (Pty) Ltd was an authorised financial services provider. When he was approached by Sharemax to market the investment he gave the prospectus to his accountant and his compliance officer. He said that as he was neither an accountant nor an attorney, he thought it prudent to seek their advice. Neither of them expressed any concern about the investment. Griffin also attended a number of

lectures and presentations about Sharemax, and was impressed with its track record. It had done property syndications for about ten years and they had all been successful. He knew that each prospectus in respect of The Villa which preceded the one in question had been fully subscribed.

[48] Griffin discussed the investment with Symons, who understood that it was a property syndication involving the construction of a shopping mall, which would provide a monthly income. He left a brochure concerning the investment and a prospectus with him, and a week or two later Symons informed him that he had decided to invest in it. He knew Symons as an astute businessman who managed his own share portfolio and who had previously invested in property syndications. Griffin himself had invested an amount of R600 000 of his and his family's money. As far as he was concerned Symons knew what he was letting himself in for, and in a sense they were in it together.

[49] Much was made in the evidence of the fact that Symons' risk profile was moderate. Griffin said in the early days he did regard Symons as a moderate investor, but later as an aggressive one. Swanepoel explained that these classifications are mere guidelines, and that a recommendation is made by a financial adviser with due regard to the particular circumstances of the investor and his objectives. He said if on the available information the investor is capable of making an informed decision, a financial services provider will not be at fault when he assists the investor to invest in a product that may carry a higher risk than the investor's risk profile would indicate.

[50] Cohen testified that there was enough in the prospectus to enable the reasonable investor to make an informed decision. He said there was nothing unsound, unusual or extraordinary in the business model. Nothing in the prospectus would have caused him concern. The model conformed to similar structures used in developments in the property industry. The only difference was that the development was funded by investors instead of a bank. He expressed the view that the investment would probably have been successful if the Reserve Bank had not intervened.

[51] It seems to me that on the information which had been given to Symons he was able to make an informed decision. He took a week or two to make up his mind, and it is probable in my view that he substantially understood the nature of the investment, and went into it with his eyes open. He knew about the upfront commission; he knew the mall was in the process of being constructed; he knew further prospectuses would be issued in order to finance the completion of the mall; and he knew there would only be a rental income once the mall was occupied by tenants.

[52] To say that a financial services provider does not guarantee either the safety or the success of an investment is to state the obvious. When the scheme collapsed Symons did not blame Griffin for having recommended a high risk investment, and by July 2012 he was still using him as his broker. The plaintiffs appear to me to have instituted the action in the hope that the defendant's professional indemnity insurer would compensate them without the matter having to go to court.

[53] I do not consider that in those circumstances it can be said that Griffin breached his contractual obligations to the plaintiffs. In case I am wrong about this, I proceed to consider whether any breach on the defendant's part can be said to have been the cause of the plaintiffs' loss.

What went wrong?

[54] I think it is important to consider what caused the scheme to collapse and the plaintiffs to lose their money, as there has to be a causal link between a breach by the defendant of its contractual obligations and the plaintiffs' loss. Where, for example, someone invests in a property development, and the partly constructed building disappears as a result of an earthquake, the investor can hardly claim damages from his advisor on the basis that he would not have invested had he been made aware of the financial risks involved.

[55] The Sharemax scheme did not fail because of high commissions paid to those who sold the investments; or because the companies concerned were unlisted; or because of the interest paid to investors from the outset; or because the scheme ran

out of investors; or because the rental income turned out to be inadequate; or because of a lack of transparency. Those were the risks identified by the critics of the scheme, but these risks did either not materialise or were not the cause of the failure.

[56] Cohen, who was the most impressive of the witnesses, and I think the most knowledgeable and experienced in this field, was not concerned by those risks. He expressed the view that if the Reserve Bank had not intervened the scheme would probably have succeeded. His view in this regard was not challenged in cross-examination, nor was it contradicted by anyone. He was impressed with the track record of Sharemax, and mentioned a similar scheme that it promoted (the Zambezi Retail Park), where the development was completed with funds raised from investors in the same fashion as the Villa.

[57] It is not contended by the plaintiffs that the intervention by the Reserve Bank should have been foreseen by the defendant. Cohen said there was nothing in the prospectus which should have alerted a reasonable financial services adviser that the funding model may run foul of the Reserve Bank or the applicable legislation.

Causation

[58] The probabilities in my view indicate that had Griffin explained to Symons the risks referred to by the expert witnesses, he would nevertheless have made the investment. He was impressed with the Sharemax track record, he found the monthly interest attractive, he liked investments in property developments and I think his approach to the risks would have been the same as that of Cohen. In any event, none of the risks mentioned by the expert witnesses can be said to be the cause of the loss. The cause of the loss was the intervention by the Reserve Bank and not any breach on the part of the defendant. The question of legal causation does therefore not arise.

[59] If it can be said that on a factual level Griffin's failure to explain the risks adequately was a *conditio sine qua non* of the plaintiffs' loss (which I do not consider to be the case) then the question of legal causation arises, as factual causation on

its own is not enough. In *Standard Chartered Bank of Canada*[3] Corbett CJ said in order to determine legal causation one has to consider whether the act was linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote. He said the test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part. Also see *International Shipping Co (Pty) Ltd*[4], and in particular the quotation[5] at 701 A-C, and *Sandlundu (Pty) Ltd*.[6]

[60] The loss suffered by the plaintiffs does not seem to me to be linked sufficiently closely or directly to any failure on Griffin's part to explain the risks of the investment to Symons. Those risks had nothing to do with the intervention by the Reserve Bank, which the plaintiffs do not contend should have been foreseen by Griffin.

[61] It follows that even if it can be said that Griffin failed in his duty to understand the scheme better and to explain the potential risks to Symons, any such breach was not causally connected to the plaintiffs' loss.

Oosthuizen v Castro

[62] Counsel for the plaintiffs referred me to the decision in *Oosthuizen*[7]*,* which also concerned Sharemax. In that case a financial services provider was held liable for damages after he had recommended an investment in the Sharemax scheme. Daffue J referred to the investment as 'lamentably bad'.[8] The facts differed in material respects from the present matter.

[63] The plaintiff was a widow who had lost her husband in a shooting incident. She was left to raise their young son. She received a substantial sum from a life

[3] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 764I -765B

[4] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A)

[5] From Fleming *The Law of Torts* 7th ed at 173

[6] *Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc* [2011] 3 All SA 183 (SCA) at para 14 -21

[7] *Oosthuizen v Castro* 2018 (2) SA 529 (FS)

[8] An expression apparently borrowed from the judgment in *Durr v Absa Bank Ltd* 1997 (3) SA 448 (SCA), which concerned an investment in the Supreme Group.

insurance policy, and wanted to invest R2 million to provide for her son's upbringing. She told the defendant that she could not afford to lose even 'two cents' and wanted a safe investment. He assured her that the investment was low risk, told her the negative press about it was motivated by jealousy, and that the product was so safe that he did not even want to discuss other possible investments. The plaintiff had no experience of financial matters, was still in an emotional state after the death of her husband, and relied on the defendant as he had been her late husband's broker.

[64] It seems plain that the Sharemax investment was not the right investment for Mrs Oosthuizen. It was not a sufficiently safe investment for her and if the risks had been explained to her she may well have found them unacceptable.

[65] This is not the same as saying that the investment was 'lamentably bad' or 'worthless from beginning to end'[9]. Obviously *Oosthuizen* was decided on the evidence in that case. The court there found that the interest to investors must have been paid out of the money invested by them and other investors. In the matter I am dealing with the evidence was that the interest paid to investors was generated by the funds in the attorney's trust account, together with the funds advanced to Capicol in terms of the sale of business agreement, on which it paid interest.

[66] It would appear that there was no expert evidence in *Oosthuizen* that the scheme would probably have been successful if the Reserve Bank had not intervened. The reason why the scheme collapsed and the existence of a causal link (both factual and legal) between the breach and the loss does not appear to have received much attention. The reason for this may well be that on the evidence in that case the defendant had been aware that the Reserve Bank had expressed concern about the legality of the funding model, which was not the case before me.

[67] *Oosthuizen* does not assist the plaintiffs in the present matter. The evidence in that case differed materially from the evidence before me – not only in relation to the circumstances of the investor, but also with regard to the prospects of the scheme, the reason why it collapsed, and the real cause of the plaintiffs' loss.

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[9] *Oosthuizen (*supra) 553C-D.

[68] To summarise: Symons was an astute, wealthy person, who took nearly two weeks to make a decision after he had met with Griffin and was given a prospectus and other documents about the investment; he understood the risks which were highlighted in the evidence and made the investment with his eyes open; Griffin consulted his accountant and compliance officer about the investment, attended presentations about it, and even wrote a test about it; he made the documentary information about the investment available to Symons, discussed the investment with him, and allowed him adequate time to consider the matter; he did not foresee the intervention by the Reserve Bank, and the plaintiffs do not suggest that he should have; if there was a failure by Griffin to provide more information to Symons, then in my view such failure was not the cause of the plaintiff's loss.

[69] In those circumstances I conclude that the plaintiffs have not established liability on the part of the defendant. The claim is dismissed with costs.

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Ploos van Amstel J

Appearances:

For the Plaintiffs	: W N Shapiro (together with) T Palmer
Instructed by	: Atkinson, Turner & De Wet Durban
For the Defendant	: H F Geyer
Instructed by	: Bieldermans Inc. C/O Thorpe & Hands Inc. Durban
Date Judgment Reserved	: 30 October 2018
Date of Judgment	: 10 December 2018