IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 00784/12-13/LP 1

In the matter between

MARTHA HELENA JOHANNA NEL **Complainant**

and

ANNA MARIA KELDER **First Respondent**

JACOBUS VAN DER WATEREN **Second Respondent**

JOHANN FREDERICH WINNERTZ **Third Respondent**

(In their capacities as executors of estate late Ferdinandus Wilhemus Kelder, in terms of the letter of executorship issued by the Master of the High Court dated 28 September 2017)

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

A. INTRODUCTION

[1] The complaint arises from a failed investment concluded by the complainant in 2007 on the advice of the late Mr Ferdinandus Wilhelmus Kelder (Mr Kelder) into Rivonia Square Shopping Mall Holdings Limited[1] ('Rivonia Square Holdings"), a property syndication scheme promoted by Sharemax Investment (Pty) Ltd ("Sharemax").

[1] Registration number 2007/007432/06.

[2] The complainant alleges that Mr Kelder, prior to her investment in Rivonia Square Holdings, assured her that the investment was safe and that the income she was due to receive from the investment was also guaranteed.

[3] The complainant received the first income from the investment in August 2007, albeit a prorated income, and continued to receive such income until 2010 even though she had been advised that she was guaranteed to receive an income until maturity of the investment, being five (5) years from the date of investment. It was then that complainant started to question the advice that had been rendered to her by Mr Kelder and specifically the whether the investment was, as complainant alleges Mr Kelder had advised, safe.

[4] The property syndication schemes promoted by Sharemax collapsed and complainant, along with a number of other investors, ceased to receive the income that had been promised to her and did not, on maturity of her investment, receive the capital that she had invested as had been promised to her.

[5] Complainant, alleges that she has lost her capital and attributes this alleged loss to what she claims was a deficient financial service rendered to her by Mr Kelder. Mr Kelder sadly passed during the investigation of this complaint but had prior to his death, responded at least twice to the complaint. Following Mr Kelder's death, the matter was brought to the attention of the executrix and executors.

Delays in finalising this complaint

[6] The delays in finalizing this complaint have been discussed at length in previous determinations issued by this Office concerning property syndication complaints.

B. THE PARTIES

[7] Complainant is Mrs Martha Helena Johanna, an adult female whose full details are on record with this Office.

[8] The first to third respondents are the executrix and executors, respectively, of the estate of the late Ferdinandus Wilhelmus Kelder who is the advisor who rendered the financial service that forms the subject of this complaint. The respondents were appointed as such through letters of executorship issued by the Master of the High Court Polokwane on 28 September 2017. References in this determination to 'the Executors' will be a reference to all three respondents.

[9] Mr Kelder was a financial services provider, duly authorized to act as such by the Financial Services Board (FSB), now the Financial Sector Conduct Authority (FSCA). At the time Mr Kelder rendered the financial advice that forms the subject of this complaint, he did so under license 15488 which was a license he acquired as a sole proprietor. The relevance of this statement will become evident later in this determination.

C. THE COMPLAINT

[10] On 7 August 2007, the complainant, acting on advice she received from Mr Kelder, invested R320 000 into Rivonia Square Holdings (Rivonia). It is common cause that the investment into Rivonia was the second investment that complainant had made into a property syndication scheme promoted by Sharemax, also on the advice of Mr Kelder. It is also common cause that the capital from which the investment was made, was part of the proceeds that complainant received from the earlier investment.

[11] The first investment by complainant into a Sharemax scheme was an investment made into Montana Cross Holdings Bpk (Montana) in May 2004 and it is common cause that complainant concluded this investment on the advice of Mr Kelder. Complainant invested R287 000 into Montana and received an income from inception of the investment to its maturity in April 2007. In May 2007, complainant received R338

040.08 from the investment which comprised the capital complainant invested in 2004, together with interest thereon of R51 040.08.

[12] Shortly after receipt of the proceeds from the investment into Montana, complainant completed an application form to again invest in Montana but it appears that the syndication was closed off to new investors. Complainant then, in August 2007, elected to invest R320 000 of the proceeds from the Montana investment into Rivonia. The difference, complainant elected to have paid to her account. Complainant alleges that the capital used for the two investments, were her life savings.

[13] Complainant alleges that she was advised by Mr Kelder, prior to her investing in Rivonia, that the investment was safe and secure and that she would receive a regular income from the investment. While the complainant started receiving an income in August 2007, she received a regular income only until 2010. From 2010 the income which had previously been paid to complainant decreased until it eventually stopped.

[14] On account of her no longer receiving an income, despite her allegations that she was advised that the income would be paid to her regularly, the complainant lodged a complaint with this Office in March 2011, but soon withdrew the complaint. Complainant alleges that she withdrew the complaint because she was coerced by Mr Kelder to withdraw the complaint. The complainant alleges that Mr Kelder had her sign a letter, which he had drawn up, asking her to withdraw the complaint. More about the withdrawal later in the determination.

[15] Complainant further alleges that she is of the view that Mr Kelder did not undertake any due diligence before advising her and that the advice from Mr Kelder was inappropriate. As such, complainant wanted Mr Kelder to be held liable for the apparent loss that she has suffered by having him repay the capital she had invested in Rivonia.

D. RESPONDENT'S VERSION

[16] On receipt of the complaint, this Office forwarded it to Mr Kelder, in accordance with Rule 6(c) of the Rules on Proceedings of this Office.

[17] In his response to the complaint dated 3 July 2012, Mr Kelder, in a response dated 3 July 2012, did not deny that he had not been in communication with the complainant since the looming collapse of the syndication but averred that he had not communicated with the complainant, since not even the promoters of the syndication could provide an answer as to what would happen to the building, or investors' capital.

[18] Mr Kelder did however deny the other allegations levelled by the complainant particularly that he had advised the complainant to invest in Rivonia. Mr Kelder claimed that the complainant had instructed him to invest in Rivonia and that the complainant chose to use her life savings to do so. Mr Kelder advised that he had not undertaken an analysis of the complainant's needs prior to the investment and that he did not have a record of the advice that complainant alleged preceded her decision to invest in Rivonia because the complainant had decided, of her own accord, to invest in Rivonia and he did not render any advice to the complainant that led her to that decision.

[19] In addition, Mr Kelder claimed that no one could have predicted what would happen to Sharemax. He stated that Sharemax was registered with the FSB when complainant invested in Rivonia and that he therefore had no doubts that Sharemax *was a "water-tight investment"*[2]*.*

[20] In response to the complainant's allegations about the withdrawal of the initial complaint she lodged during March 2011, Mr Kelder claimed that the complainant

[2] Translated from Afrikaans.

chose to withdraw the complaint because she acknowledged that Mr Kelder had not advised her to invest in Rivonia and that she had in fact instructed Mr Kelder to assist her with the investment. Mr Kelder claimed that the complainant realised that he could therefore not be held accountable for the loss complainant suffered on the collapse of Sharemax. What is interesting however is that Mr Kelder, subsequent to the complainant lodging her complaint with this Office, offered to settle the complaint with the complainant by paying to the complainant an income of R1 350 for a period of 12 (twelve months) commencing on 30 June 2012.

[21] The offer was purportedly, as it appears in the settlement agreement, an offer of goodwill made without acknowledgement of any wrongdoing by Mr Kelder and Mr Kelder claimed that he made this offer to complainant because he felt sorry for his clients who had invested in the syndications that failed.

[22] Mr Kelder attached documents he was of the view would support his averments but notably did not provide this Office with copies of the documents he had been requested to provide. These documents were to include a record of the advice and which should supported the allegation that he acted on the complainant's instruction to invest in Rivonia and that he allegedly did not render any advice to the complainant in respect of the investment in question.

E. INVESTIGATION OF THE COMPLAINT

[23] After due consideration of the aforementioned response, this Office was of the view that Mr Kelder had failed to adequately address the allegations raised by the complainant and on 21 August 2012, sent correspondence to Mr Kelder informing him of this. Mr Kelder was also provided with a further statement received from the complainant in response to his initial reply. This response was received from

complainant after she was requested to address this Office, on the allegation that she made the decision to invest in Rivonia of her own accord.

[24] Having found no record that Mr Kelder responded to the correspondence referred to in the preceding paragraph, this Office sent a notices in terms of section 27 (4) of the Financial Advisory and Intermediary Services Act on 11 June 2015 and 5 July 2017 respectively, advising him that the matter had been accepted for formal investigation. The notices also advised that Mr Kelder was now viewed as a respondent and was called on to answer the various allegations made by complainant and referred him to the sections of the FAIS Act and the Code of Conduct which he, in terms of the allegations from complainant, seemed to have breached. Mr Kelder responded on 7 July 2015.

[25] Rather than address this Office on the allegations set out in the notice of 11 June 2015, Mr Kelder simply claimed that the complainant was again receiving an income from the property syndication and attached a statement of the alleged payments to his response. There was no statement from Mr Kelder on where he had acquired these details about the alleged payments and who had compiled the statement that he submitted in support of his response. The credibility of the statements was further called into question by the fact that the statement did not reflect any fluctuations in the income paid to the complainant, which it should have done in light of the statements received from complainant that the payments had become inconsistent over time until she received the final income from the property syndication scheme in 2010. No response was received to the notice of 5 July 2017.

[26] In September 2017 this Office learnt of the passing of Mr Kelder and notified the executors, on 19 October 2017, of the pending complaint against Mr Kelder as well as the correspondence exchanged to date and requested the executors to respond to the notice of 5 July 2017 to which this Office had received no response.

[27] In response to the aforesaid letter, the executor's attorneys indicated that they had not received the notice of 5 July 2017 even though it was attached to the correspondence of 19 October 2017. They raised two *points in limine,* claiming firstly, that Mr Kelder ran the business as a member of a close corporation and that the financial service was rendered to the complainant under a license acquired by the close corporation bearing license number 25545. The executors thus claimed that the claim did not fall against the estate but fell against the close corporation. The second point raised by the executors was that the claim had prescribed.

[28] In respect of the merits of the complaint this Office was referred to the 'Risk Assessment of Product Information' documents that were attached to Mr Kelder's first response to the complaint. There were no statements on how this information denounced the allegations made by complainant that she had suffered a loss as a result of the alleged failure by Mr Kelder to recommend an appropriate product. This response, as with those submitted by Mr Kelder previously, was found to be inadequate as it did not address this Office on the issues pertinent to the complaint.

[29] This was communicated to the respondents in an email of 20 November 2017. The respondents were advised that the information received from the FSCA, at the time the complaint was received, showed that Mr Kelder had operated the business as a sole proprietor when he rendered the financial service to the complainant. The respondents were also advised that the complaint had not prescribed because the complainant had last received an income from the investment in 2010 and that while she had withdrawn the complaint lodged in March 2011, she again lodged the complaint in 2012, which was also within the three years afforded to her by the law to do so. The notice, which the respondent had claimed had not been sent to them was attached to this email to the respondents.

[30] There was further correspondence exchanged between this Office and the respondents in which this Office afforded the respondents further opportunities to respond to the allegations levelled against Mr Kelder and in response to which the respondents maintained, despite evidence to the contrary, that Mr Kelder had rendered the financial service under the license of a close corporation and that the complaint had prescribed. The respondents had also consistently claimed that they never received the notice sent to Mr Kelder on 5 July 2015 even though this had been attached in at least two previous emails sent to them. Final correspondence, being a new notice in terms of section 27(4) of the FAIS Act, was sent to the respondents on 30 April 2018. In response to this notice, the respondents merely referred this Office to the previous responses it had submitted.

F. DETERMINATION

[31] The issues for investigation and determination are the following:

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

b. Did the respondent 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) and (2), as well as section 9.

c. Did the respondent act in breach of his contract with the complainant; and

d. did the complainant suffer loss and if so, what was the cause of the loss and the quantum thereof.

[32] In this determination, I will deal first with the *points in limine* raised by the respondents.

Prescription

[33] The respondents claimed that because the complainant alleges that Mr Kelder was negligent when rendering the financial service to her that the claim arose when the financial service was rendered, in 2007. A complaint should therefore have been

lodged within three years from 2007. The respondents make this argument notwithstanding the fact that the complainant could not, in 2007, have known that the advice was inappropriate since she received the income that was promised to her and was not aware then of the issues that ultimately led to the collapse of Sharemax.

[34] To require that a complainant, at a time when there is no evidence of a deficiency of the financial service rendered to them, otherwise know that something is or has gone wrong, is unreasonable. A simple interpretation of section 27(3) of the FAIS Act confirms that a complaint is considered to have prescribed if it is lodged more than three years after the date on which a complainant became aware of an act or omission that forms the subject of the complaint, or three years from when a complainant ought reasonably to have become aware of such act or omission, whichever occurs first.

[35] It is evident from the facts of the complaint that the complainant became or, in my view, ought reasonably to have become aware of the act complained of when her income decreased since, by her version, she was advised that the income would be guaranteed for the duration of the investment. Complainant stopped receiving an income in 2010 and although she withdrew the first complaint lodged in March 2011 she lodged the present complaint in April 2012 which is also still within the three years afforded to her to do so.

[36] The respondent's argument then that the complaint had prescribed is incorrect and falls to be rejected.

Claim incorrectly lodged against the estate

[37] The second *point in limine* raised by the respondents is that the complaint was incorrectly transferred to Mr Kelder's estate on his death. Mr Kelder, in their view, rendered the financial service as a member of a close corporation and under the license of the close corporation. It is unclear how the respondents thought this a valid argument

when it is clear from the investment documents that the financial service was rendered under license 15488 while the close corporation, by the respondents' own version, was licensed under license 25545. The respondents were both in possession of the documents which showed the license under which the financial service was rendered and were also informed by this Office that the FSCA had confirmed that Mr Kelder, when he rendered the financial service did so under license 15488 which was the license he held as a sole proprietor. The respondents nonetheless rejected this information and quite vehemently stated that the FSCA was wrong and that it provided this Office with the incorrect information. In my view, the information obtained from the FSCA conclusively shows that at the time material to this complaint, Mr Kelder acted as a sole proprietor and rendered the financial service to the complainant in that capacity. I am therefore satisfied that the complaint was correctly lodged against Mr Kelder in his personal capacity and that on Mr Kelder's death, against his estate.

[38] This *point in limine* thus also falls to be rejected and the merits of the complaint must now be considered.

Merits of the complaint

[39] The complainant alleges that Mr Kelder was negligent when rendering the financial service to her and that Mr Kelder's advice was inappropriate. The only rebuttal that Mr Kelder had to these allegations was that he did not render any advice and that the complainant, of her own accord, decided to invest in Sharemax. He thus denied that he was responsible for the loss the complainant suffered.

[40] On a consideration of the definition of 'advice' however, it becomes apparent that Mr Kelder did in fact give advice to the complainant. According to section 1 of the FAIS Act, *'advice, means, subject to subsection 3*(*a*)*, any recommendation, guidance or proposal of a financial nature furnished, by any means, or medium, to any client or group of clients'*.

[41] Even if I were to accept that Mr Kelder did not recommend to complainant that she invest in Rivonia, it is evident from the fact that the complainant, after being unable to reinvest in Montana, was at the very least, guided by Mr Kelder to invest in Rivonia since there is no evidence that the complainant knew of or was acquainted with the syndications and knew which were open to investors. There is nothing from the facts of the complaint and the statements made by the complainant and Mr Kelder which suggest that the complainant was, prior to the investment in 2004, conversant with Sharemax and the property syndication schemes promoted by it and that she was in a position to decide to invest in any of these syndication schemes without having being guided to do so by Mr Kelder.

[42] Furthermore Mr Kelder was rewarded for the complainant's business through the commission he received on the investment, and therefore had to ensure that the product he recommended was suitable for his client's needs and circumstances. I am therefore satisfied that Mr Kelder's actions fell within the definition of advice, as set out in section 1 of the Act and that he therefore had to observe sections 8(1) (a) - (c) of the Code prior to advising the complainant.

[43] Sections 8(1) (a) - (c) of the Code states that:

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 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, FAIS Act, or any contractual arrangement.

[44] Mr Kelder admitted to not having undertaken any of the steps detailed above because of his misplaced view that the service rendered to the complainant did not qualify as advice. He therefore failed to discharge the duties imposed on him by the Code.

[45] In addition Mr Kelder had a duty to provide a reasonable and appropriate general explanation of the nature and the material terms of the transaction as required by section 7(1)(a) of the Code of Conduct. Section 7(1)(c) states that where a financial product is marketed or positioned as an investment or as having an investment component, that concise details be provided on the manner in which the value of the investment is determined, including any concise details of any underlying assets or other financial instruments.

[46] The respondents, in an apparent response to whether this was done, referred this Office to the 'Sharemax Investments Risk Assessment on Product Information' attached to Mr Kelder's first response to the complaint. This document includes broad questions on the duration of the investment and a statement to the effect that 'the shares in the public company' are not listed but it provides no explanation on what this means and whether these are the only risks inherent in the product. It also does not state that investors could lose all their capital. This seems to be the only document that was provided to the complainant on the risks inherent in the product despite the fact the complainant had no relevant previous product experience and given her reasonably assumed level of knowledge. It is for this reason that I cannot see that the information was sufficient to place the complainant in a position to make an informed decision, as required by section 8(4) of the Code Conduct.

[47] Mr Kelder's reliance on the fact that Sharemax was registered with the FSCA at the time the financial service was rendered to the complainant, in his view, seems to be sufficient to address whether the product was as safe as was represented to the complainant and whether the product was appropriate to the client's financial circumstances. The FSCA does not regulate products. It remains the duty of the FSP to satisfy itself of the risks inherent in a particular product, and to match the product with the client's risk profile and needs in line with section 8 (1) (a) to (c) of the Code. Mr Kelder therefore remained duty bound to interrogate the appropriateness of the product to the complainant and her circumstances and risk profile but by his own version, he did not undertake this duty.

[48] This behaviour by Mr Kelder can be likened to that said to have been exhibited by the appellant in the matter between J*ohanes Christian Mostert and Carol Charlotte van Zyl* (*Mostert v van Zyl)* before the then Appeals Board, now the Financial Services Tribunal. In *Mostert v van Zyl*, the Appeals Board found that the appellant had not led any evidence to show that he took the trouble *'to explain the precise nature of the product and the risks inherent therein to the deceased'*. As with the present matter, the appellant in *Mostert v van Zyl* relied on Sharemax's track record over a period of time as a determinant to guide the complainant to invest in the product.

[49] I also refer to the judgment of Daffue J, in the matter of *Oosthuizen v Castro*[3] where the following was noted:

"…….according to the pleadings defendant admitted informing plaintiff that she did not have to be concerned as he had spoken to Sharemax as well as his consultant. This was not good enough. Defendant should have spoken to independent auditors, attorneys or financial analysts. He should have insisted on financial statements, such

[3] 2858/2012, High Court, Free State Division, paragraph 53.

as income and expenditure accounts, cash flow analyses and a balance sheet. He should have inspected the shopping complex. If he did that, he would know that the investment could not possibly have an income stream at that stage or even in the foreseeable future". (my emphasis).

[50] In my view it therefore follows that the steps taken Mr Kelder, similarly to those of the appellant in *Mostert v van Zyl*, did not meet the standard of a reasonable financial services provider, in the circumstances[4]. I agree with the finding of the Appeals Board in *Mostert v van Zyl* that, '*a reasonable financial services provider would not have relied on the promoters only and would have obtained independent advice as to the merit of the product*'[5].

[51] Mr Kelder made no effort to advise complainant to invest in a product that would be suitable and in line with her circumstances. His statement that at the time complainant wanted to invest, that the available investment was in Rivonia, indicates that he did not even consider other investment options that could have been more appropriate for the complainant's circumstances and needs.

[52] There has been no evidence from Mr Kelder and subsequent to his death, from the respondents, which refutes the allegation that the complainant relied on the information received from Mr Kelder when she invested in Rivonia. All Mr Kelder had said to defend himself was that the prospectus was provided to the complainant. It seems that Mr Kelder intended for this Office to accept that, because of the prospectus and the information contained therein, that he was absolved of the duty to provide the complainant with the information she required.

[53] That there was a prospectus available and whether this was provided to the complainant does not aid the respondents in their defence since the prospectus itself

[4] Paragraph 37.
[5] Paragraph 40.

did not accord with the law. This is especially important because Mr Kelder failed to demonstrate that he understood and explained the content of the prospectus to his client, or that he was even aware of the contraventions of Notice 459 or the lack of governance within Sharemax, as explained in the attached summary of the prospectus.

[54] Mr Kelder admittedly conducted no due diligence on the investment but seemingly assumed that if a previous investment had delivered the returns promised that this one would too. This, in my view does not accord with the actions section 2 of the Code demands be exhibited by a provider of financial services, I cannot see that Mr Kelder in effectively just moving the complainant's funds from one property syndication to the next, especially when he displayed such little knowledge of the syndications, acted with the due skill, care and diligence called for and in the interest of the complainant and the financial services industry.

[55] On the facts before me, I find as follows:

a. The respondent failed to render financial advice with the necessary skill, care and diligence required.
b. The respondent, in providing financial advice, failed to provide his client with information that was factually correct
c. He failed to provide information about the products that were adequate and appropriate.
d. The respondent failed to provide full and frank disclosure of information to the complainant enabling her to make an informed decision.
e. Mr Kelder failed to demonstrate that he understood and explained the content of the prospectus to his client, or that he was even aware of the contraventions of Notice 459 or the lack of governance within Sharemax, as explained in the attached summary of the prospectusThe respondent failed to take reasonable

steps to ensure that the complainant understood the advice and was in a position to make an informed decision.

[56] I find that the respondent also contravened the following sections of the General Code: Sections 3 (1) (a) (i) and (iii); Section 7 (1) (a); Sections 8 (1) and (2); and section 9 (1).

G. CAUSATION

[57] No liability however can be imputed on Mr Kelder unless it can be shown that the failure by Mr Kelder to act as a reasonable financial services provider caused complainant to suffer the loss complained of.

[58] Mr Kelder rendered the advice that led complainant to invest in the syndication and when rendering the financial service to the complainant, Mr Kelder had to align his conduct with the Code. In contravening the Code, Mr Kelder failed to act with the skill and care required of him. I am thus satisfied that factual causation has been established.

[59] In light of the above, I am persuaded that the complainant would not have concluded any of the investments, and specifically the investment in question, had Mr Kelder not failed to discharge the duties imposed on him by the Code. I am persuaded that Mr Kelder was in fact negligent when rendering the financial service to the complainant and that this was caused by his failure to interrogate the promises made by the promoter of the syndication regarding the returns of the investments and also because Mr Kelder seemingly made assumptions about the safety of the product because of Sharemax's 'track-record'. The breaches of the Act committed by the respondent directly resulted in the complainant's loss. To support these finds I refer to

determination in *ACS Financial Management vs Coetzee*[6] and the Tribunal's decision in *J G Financial Service Assurance Brokers (Pty) Ltd and another vs Robert Prigge*[7].

H. THE ORDER

[60] In the instance, I make the following order:

1. The complaint is upheld.

2. The respondents are ordered, to pay to the complainant, the amount of R320 000 from the estate of the deceased.

3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.

4. Complainant to cede her rights and title in respect of any further claims in respect of these investments to respondents.

DATED AT PRETORIA ON THIS THE 19th DAY OF SEPTEMBER 2018.

NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS

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7 FAB 8/2016