THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 7434/10-11/KZN1

FAIS 7435/10-11/KZN1

In the matter between:-

Pieter Jurie Wessels	**First Complainant**
Jillian Claire Wessels	**Second Complainant**
and	
Clyde Dawes Langley	**1st Respondent**
Levator Wealth CC	**2nd 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 complainants are married to each other and are both pensioners. Both of them, independently, invested part of their retirement capital in Sharemax

property syndication. This was done upon the advice of the respondents, in particular the first respondent.

[2] It is well known that the Sharemax property syndication collapsed and investors stopped receiving income. After the collapse the complainants filed complaints against the respondents in terms of the Act. The complainants filed separate complaints but due to the fact that the circumstances are similar, I decided to deal with both complaints in a single determination.

B. THE PARTIES

[3] The first complainant is Pieter Jurie Wessels a seventy four year old pensioner who resides at Highlands Road, Sweetwaters, Pietermaritzburg.

[4] The second complainant is Jillian Claire Wessels a seventy one year old pensioner who resides at the same residence as 1st complainant. Both complainants are no longer able to work.

[5] The first respondent is Clyde Dawes Langley an adult male financial services provider practicing as such under the name and style of Levator Wealth CC at 44 Connors Road, Chaseview, Pietermaritzburg.

[6] The second respondent is Levator Wealth CC a close corporation duly registered according to the laws of the Republic of South Africa, having its principal place of business at 44 Connors Road Pietermaritzburg.

C. THE ISSUES

The following are issues for determination:

[7] Whether the respondents rendered the financial service herein negligently and/or in a manner which is not compliant with the Act and Code;

[8] If it is found that the respondents did render the financial service negligently and/or failed to comply with the Act and Code, whether it was such conduct that caused the complainant loss.

D. THE COMPLAINT

[9] The complainants saw an advertisement in a local newspaper calling upon readers to consider investing in Sharemax. The advertisement was placed by the respondents. The first complainant responded to the advertisement and spoke to the first respondent. The latter then visited the complainants at their home and presented the Sharemax property syndication as an appropriate investment for their retirement.

[10] The first respondent assured the complainants that Sharemax was “the safest property investment that was available”. The complainants were persuaded by the first respondent’s presentation to invest in The Villa Retail Park Holdings 2 Limited (The Villa).

[11] The complainants had been living off their invested retirement capital and were attracted to the returns being offered by Sharemax, a promised 12% per annum. This outperformed their current investments. This return meant that they could improve on their standard of living. Their retirement funds came from savings and the sale of first complainant’s property. Each of the complainants had their own retirement funds.

[12] The complainants were in a situation where their existing investments were maturing and funds were to be freed for further investment. It must be noted that at this stage all of the complainants’ funds were invested in investments such as Sanlam Glacier and ABSA savings accounts. Accordingly, the complainants told the first respondent that funds will become available from existing investments. The latter advised the complainants to invest their funds in Sharemax.

[13] According to the complainants the first respondent gave an excellent presentation that was very persuasive. It is not in dispute that the first respondent made a presentation of only Sharemax products. There was no presentation of other or alternative or comparable products. The first respondent also gave the complainants prospectuses for The Villa. The first respondent’s presentation was

described as “dynamic” and he gave assurances that this “was an investment safer than a bank”. The first respondent told the complainants that there was no risk of losing their investment “whatsoever”.

[14] The complainants were so convinced by the first respondent that they virtually drained their savings accounts to invest in The Villa. The investments were made over a period of 14 months.

[15] According to the complainants first respondent “overwhelmed” them with information, brochures and prospectuses on The Villa. They were given lists of signed up tenants with details of monthly rental figures. The monthly rental for the initial tenants were in excess of R6 million. First respondent pointed out that the Villa project would be completed after one year. He also pointed out that the developer had an option to buy the property, in which event the complainants’ investment would enjoy a 30% growth. First respondent explained that if the developer did not exercise the option, then the investors would receive a 10% return per annum escalating by at least 4% per annum to above 20% in 5 years. The complainants were further advised that within 3 to 10 years the property was likely to be bought by a large organization or a pension fund “at a high capital gain, in the region of 40 to 60%”.

[16] The first complainant wanted an explanation from the first respondent as to how Sharemax was able to pay 12% thereby outperforming the banks. The

explanation is worth quoting, this is what was told to the complainants by the first respondent:

"the banks were charging the developer 17% interest to finance the operation. Sharemax were lending money to the developer at 14%, thus saving him 3%, their benefit was this difference between 11% and 12.5%, which they were paying their investors. On one billion Rand this amounted to at least 1.25 million Rand per month, which to me as an engineer made a lot of sense."

Significantly, this explanation one will not find in the prospectus and I shall say more about this later in this determination.

[17] The complainants were convinced that the Sharemax investment was the "end of their financial worries". They informed first respondent that their funds were locked into 12 month deposits and upon maturity they will invest in Sharemax. Since May 2009 this is what they did.

[18] The complainants made the following investments:

The first complainant;

28th May 2009	R200 000 – 00
1st July 2009	R300 000 – 00
12th July 2010	R240 000 – 00

The total investment is R740 000 – 00.

The second complainant;

1st July 2009	R400 000 – 00

17th August 2009	R100 000 – 00
18th June 2010	R100 000 – 00
1st July 2010	R120 000 – 00

The total investment is R720 000 – 00.

[19] Of significance to the complainants is that even after the Reserve Bank started to question the Sharemax model, the first respondent continued to advise them to invest in Sharemax stating that they should not believe the rumors. He stated that instead of being paid 12% interest they will be paid a dividend of 10% free of tax. The complainants believe that once the Reserve Bank intervened the first respondent should not have advised them to invest; instead he should have advised them to hold on to their funds until the Reserve Bank cleared the Sharemax model.

[20] The complainants now struggle to survive on a meager income from what was left in their investments. They receive no income from the Sharemax investments and believe that their capital is also lost.

[21] The complainants state that the first respondent did not take the trouble to find out all the facts about the product and was motivated by the lucrative commission being paid by Sharemax. They believe that they were not competently advised and require the first respondent to repay the full amount of their investment.

E. RESPONDENTS' RESPONSE.

[22] The first respondent responded to the section 27 notice. He acted on his own behalf and also represented the second respondent. The content of the respondents' file was also forwarded to this office.

[23] The first respondent made a statement setting out why he should not be held liable. His principal submissions are as follows:

23.1 The first respondent also dealt with the complainants separate complaints as one matter. First respondent admits that the complainants responded to an advertisement for Sharemax investments that was placed in the media by him. First complainant then called him to make a presentation at their home.

23.2 First respondent states that he presented the complainants with the latest prospectus from Sharemax. First complainant informed the first respondent that they had money being released from the bank which was the first of eight investments. After the initial investments, first complainant asked the first respondent to take over unit trusts investments of about R1 500 000 – 00.

23.3 First respondent points out that it was first complainant that made all the decisions as he "called the shots".

[24] Respondents point out that the complainants' had all the information pertaining to the Sharemax investments, had attended a roadshow where they received

information from the officials and were in a position to make an informed decision. First respondent states that after the initial investment was made he did not solicit more funds from the complainants; they called him “out of the blue” with more funds to invest. He notes that the complainants invested “without any coercing from me”.

[25] First respondent believed that the complainants had spread their investments as they were also receiving dividends from listed shares. He was satisfied that their portfolio was diversified. He also noted that the complainants’ home and motor vehicles were diversified.

[26] First respondent believes that the 6% commission he received was justified as it was approved “by the powers that be”. He responded to the accusation that he should not have continued with Sharemax once he knew that there were problems by simply stating that “some of the senior officials of Sharemax did not know of the impending disaster until the last moment.” He further points out that other investments, similar to the Sharemax model have succeeded.

[27] Respondents point out that the complainants found the 12% return to be very attractive as it outperformed the bank. Perhaps it is they who were greedy in continuing to invest in Sharemax.

[28] According to the respondents all information imparted to the complainants, as well as to dozens of other clients, was information obtained from Sharemax. First respondent did not “suck information out of his thumb”.

[29] Respondents point out that complainants signed a document to the effect that "all decisions to invest in Sharemax was based on the registered prospectus that was approved by the attorneys Weavind and Weavind and their advocates, which cost Sharemax R100 000 – 00 per prospectus."

[30] According to the respondents, complainants signed all the necessary forms including a risk analysis. Respondents state that as intermediaries, they complied with the requirements as set out by the FAIS act.

[31] The respondents conclude by stating as follows:

"Isn't it strange that the insurance industry or the bodies that govern it, is the only industry that holds its sales force accountable when the product fails to perform. For instance, if a car salesperson sold a car that turned out to be a dud, is he/she blamed or the manufacturer? And this applies to all aspects where a salesperson is involved.

You cannot hold a salesperson accountable for product failure unless he was withholding material evidence that led to its failure, which is extremely difficult to prove."

F. RESPONDENTS' LICENSE

[32] It is important, for the purposes of this determination, to consider the license of the respondents.

[33] The respondents operate under a license issued by the FSB under FSP number 31985. The significance of this license is that it authorizes the respondents to deal in product categories 1.8 and 1.10. As pointed out in the respondents' documents, they may render advice and intermediary services in respect of unlisted securities and debentures "(Sharemax Property Syndication").

[34] The FSB grants this category of license only to individuals who have the necessary qualifications and experience to understand the type of financial products under categories 1.8 and 1.10.

[35] The license informs one that the respondents were competent to give advice regarding investments in property syndication schemes. That they understood the laws and regulations pertaining to property syndication, and that they were capable of understanding the prospectuses that were registered by the promoters. I note further that the respondents enjoyed the assistance of compliance officers – ISS Compliance (KZN) (Pty) Ltd.

G. DISCUSSION

[36] I now deal with the facts of this case and in particular the respondents' response to the complaint.

[37] The respondents admit that the investments were made through their services. It is equally not in dispute that the respondents held themselves out to be licensed financial services providers. The first respondent provided the complainants with

a document that sets out his licensed status and his experience as a financial services provider.

[38] The respondents do not dispute the fact that the complainants were introduced to the Sharemax products by them and that all the information about the product came from them. Nor is it in dispute that the respondents advised and indeed encouraged the complainants to invest in Sharemax.

[39] The respondents now suggest that the decision to invest in Sharemax was made solely by the complainants and in particular the first complainant. The respondents state that the complainants made an informed decision. Merely to give information about a product is not enough. The complainants, as they correctly point out, are not experts in financial planning and financial investments. Accordingly they sought the services of the respondents.

[40] It cannot be disputed that the complainants chose to invest in Sharemax as a direct result of advice received from the respondents. It cannot help the respondents to now say that the complainants made an informed decision. Even on the respondents own version, it cannot be said that the complainants made an independent decision to invest in Sharemax. The respondents cannot, and in fact do not, dispute that they rendered advisory and intermediary services to the complainants for which they received a commission of 6%.

[41] In rendering such services the respondents are bound by section 2 of the Code which provides as follows:

"A provider must 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."

The question here is whether the respondents complied with this section of the Code.

[42] The respondents state that there was no coercion for the complainants to invest in Sharemax. This is not relevant as it is not the complainants' case that they were coerced in any way. The complaint is that the respondents did not conduct themselves according to the Code and gave inappropriate advice.

[43] Of serious concern to me is the first respondent's attitude that he is merely a salesman and that salespersons cannot be held liable in the event of product failure. At the outset I have to remind the first respondent that he is not a salesman, he is a licensed FSP. As a licensed FSP he is obliged to comply with the provisions of the Act and the Code as well as the relevant Board Notices that are published from time to time. He is certainly not in the same class as a car salesperson.

[44] The first respondent cannot claim to be a mere salesperson, on his own version, he rendered financial advice and intermediary services to the complainants as defined in the Act. It is alarming that the first respondent should even consider himself as nothing more than a salesman. This indicates a complete misdirection on the part of the first respondent regarding his role and function as a licensed FSP. One must now question his competence to retain his license.

[45] The first respondent is equally misdirected about product failure. The complaint against him is not about product failure but about the competence of his advice to invest in this product in the first place.

H. COMPETENCE OF ADVICE

[46] I have stated repeatedly that an FSP must first understand his client's needs and tolerance for risk before giving product advice.

[47] The first mistake that the respondents made was to have a proper understanding of the complainants needs in the long term and their risk profile. The first respondent incorrectly assumed that the complainants were well off and had a diversified portfolio. If the respondents did their work properly they would have found out that although the complainants had invested in listed securities, this was a modest amount and that the bulk of their funds were invested in Sharemax, upon the advice of the respondents. They would also have found out that the motor vehicles were paid off due to the fact that they were very old.

[48] The respondents knew that the complainants had invested their retirement funds in conservative investments such as fixed deposits and conservative unit trusts. The Sharemax investment was a replacement product and accordingly the respondents were obliged to comply with section 8 (1) (d) of the Code. In particular the respondents had to comply with subsection (v) which provides that full details of*" material differences between the investment risk of the replacement product and the terminated product"* had to be provided.

[49] I found no evidence of compliance with this section in the respondents' documentation, nor does the first respondent deal with it in his response to this office. I must assume that there was noncompliance with section 8 (1) (d) of the code.

[50] The respondents rely on the fact that the complainants signed the application forms which contain a warning that the Sharemax product comes with risks. There is a warning regarding liquidity in that the shares cannot be sold. There is also a warning that the capital is not guaranteed and nor is the income. For a full discussion on this aspect I refer to the case of SIEGRIST (FAIS 00039/11-12/ GP 1).

[51] Certainly, the Sharemax forms set out the risks. However the first respondent does not dispute that he told the complainants that this was a "safe" investment. Nor does he dispute that he was told that the complainants wanted their capital to be safe ("guaranteed"). What the respondents did is that they ignored their own risk assessments of the complainants.

[52] The complainants were asked to complete a form with the title "*Needs analysis and client risk profile questionnaire for investments only".* In this form question 9 reads as follows, "*How much investment capital can you afford to lose?"* To this question the complainants responded, "***None".*** In this same form the complainants are invited to make additional comments regarding their risk profile. This is what the complainants wrote, *"Fund manager must only take his fee from growth and not capital."* It was made abundantly clear to the respondents that the

complainants were not able to risk any part of their capital. This is not surprising as, to the knowledge of the respondents, the complainants were over 70 years old, incapable of working and had no prospect of replacing any lost capital.

[53] The respondents also carried out a further risk analysis which involved filling out another questionnaire. This form contains a number of questions to which the investor is presented with a multiple choice of answers. Each chosen answer is allocated points which are totaled up to indicate the risk profile of the client. Question 8 reads, *"What is your objective for this investment?"* The answer given by the complainants is, *"Income and capital growth."* In paragraph 9 the question reads, *"What is your attitude to risk?"* The answer selected is the following; *"I would favour a balance portfolio that contains a mix of low and risk assets, higher but weighted more towards higher risk securities so that I can increase the return potential."*

[54] The complainants made a score of 53 to 66 points which meant, according to the form, that the complainants were "*Medium*" risk and required a "*Moderate*" portfolio of "*up to 75% in equity investment*"*.* On the respondents' own risk analysis, it was entirely inappropriate to invest in Sharemax. The respondents simply ignored their own risk assessment of the complainants. This is reckless conduct which is a breach of the Code.

[55] What aggravates the situation is the fact that the complainants, over a period of 14 months, made no less than eight separate investments in Sharemax. The first respondent knew that this was contrary to the risk profile of the complainants but

nevertheless went ahead with the investments, all of which was in the same asset class. The respondents failed to offer the complainants a choice of products. Only Sharemax was offered as option. The respondents give no rational explanation for this.

[56] What makes matters worse is that even after the Reserve Bank sounded a public warning, first respondent continued to advise the complainants to place more money into Sharemax. Common sense or basic prudence dictates that the respondents should have immediately put a stop to further investment, as did many other FSPs. The only conclusion to be drawn from this conduct is that the respondents were motivated by the lucrative commission and were no longer acting in the interests of the client.

[57] Equally of concern is the respondents' admission that they got an explanation from Sharemax as to how the 12% return was being paid, bearing in mind that The Villa had no trading history. The respondents were told that the investors' money was being lent to the developer who paid interest of 14%. The investors then received 12%. A competent broker, especially one with a category 1 license, would have been extremely alarmed at this explanation. Firstly he would have questioned how the developer was going to pay the 14% interest in the first place. Secondly he would have pointed out that this was not explained in the prospectus. Thirdly he would want to know how investors' money was being transferred out of the attorneys trust account before transfer of the property could take place. Fourthly, he would have realized that this was contrary to the Government Gazette on investor protection, Government Gazette No. 28690,

Notice No. 459 of 2006 issued by the Department of Trade and Industry, in terms of the Consumer Affairs (Unfair Business Practices) Act, 1988, (the Gazette). Any competent FSP, upon hearing this explanation, would have stopped the investments and sounded the alarm. Certainly, by all accounts, the first respondent must have realized that the Sharemax investment was not appropriate for old age pensioners. Equally, he should have realized that he was putting the complainants' funds at risk.

I. FINDING

[58] On the facts before me the first respondent failed to apply his mind and his skills as an FSP. He failed to meet the standard set in section 2 of the Code. The result of this was his entirely inappropriate advice to the complainants to invest in risky property syndication.

[59] I find that the respondents were in breach of section 2 of the Code. I find further that this breach resulted in loss to the complainants.

[60] In the premises the respondents are liable, jointly and severally, for the payment to the complainants of the capital that was invested in Sharemax. The complainants tender their shares to the respondents upon repayment of the capital.

J. ACCOUNTABILITY

[61] I deem it appropriate that I deal with the issue of joint and several liability of the respondents herein. I have held that the first respondent failed to comply with the Code in the rendering of the financial service herein. First respondent is a proprietor and key individual of the second respondent. On the facts of this case, if I were to hold 1st respondent solely liable this would not be in line with what the legislature intended as evidenced by the FAIS Act. I say so for the following reasons:-

61.1 In terms of section 8 (1) (c) of the FAIS Act in instances where a financial services provider is, amongst others a corporate body, the applicant for licensing must satisfy the registrar that any key individual in respect of such applicant complies with the requirements of 'personal character qualities of honesty and integrity; and competence and operational ability'. It is only when the registrar is satisfied that an applicant meets these requirements that a license will be granted.

61.2 Additionally 'no such person may be permitted to take part in the conduct or management or oversight of a licensee's business in relation to the rendering of financial services unless such person has on application been approved by the registrar.'

[62] Section 8 (5) (ii) additionally requires that upon the change in the personal circumstances of a key individual a registrar may impose new conditions on the licensee. From the obligations imposed on the key individual it is clear that it is the key individual himself that is personally responsible to satisfy the registrar

that he is fit and proper. Authorization of the entity is approved through the key individual himself.

[63] The fact that where the key individual does not meet the legislative requirements of fit and proper, the corporate entity's license can be withdrawn, which means the intention of the legislature is to hold both persons accountable. The General Code of Conduct for Authorized Financial Services Providers and Representatives (the Code) clearly envisages that the general and specific 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 require human intervention. So too are all the requirements set out in Parts III, IV, V and VI.

K. QUANTUM

[64] The first complainant invested an amount of R740 000 – 00. The second complainant invested R720 000 – 00.

L. THE ORDER

In the premises the following order is made:

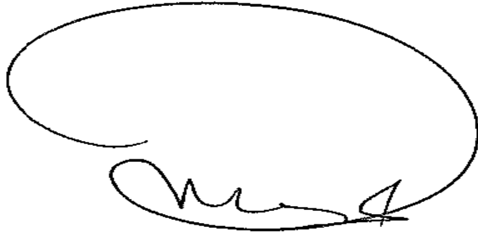
In respect of the first complainant:

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to first complainant the amount of R740 000,00;
3. Complainant is to hand over, upon full payment, all documents and securities, forgo any rights or interest pertaining to the investment in favour of respondents;
4. Interest at the rate of 15.5 %, per annum, seven (7) days from date of this order to date of final payment;

In respect of the second complainant:

1. The complaint is upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to second complainant the amount of R740 000,00;
3. Complainant is to hand over, upon full payment, all documents and securities, forgo any rights or interest pertaining to the investment in favour of respondents;
4. Interest at the rate of 15.5 %, per annum, seven (7) days from date of this order to date of final payment;

DATED AT PRETORIA ON THIS THE 19th DAY OF FEBRUARY 2013.



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