IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS-05239-12/13-WC 1

In the matter between

LESLIE JOHN RAYMOND WIGMORE	**First Complainant**
NORA BARNATH WIGMORE	**Second Complainant**

and

D RISK INSURANCE CONSULTANTS CC	**First Respondent**
DEEB RISK	**Second Respondent**

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

A. INTRODUCTION

[1] This complaint follows failed investments that the complainants made into property syndication schemes managed by the now embattled Sharemax. The complainants made these investments following advice they received from the second respondent. The advice itself was preceded by a call the second complainant made to the respondent, in which she detailed her unhappiness with the performance of an investment she held at the time.

[2] The complainants allege that the second respondent furnished them with incorrect information regarding the investment, which information led them to make the investment. The income the complainants were told they would receive ceased and the complainants are also yet to receive their capital back.

[3] The complainants state that while they had heard from updates provided to them on the syndication that it may take ten to twenty years for them to receive their invested capital, they were in need of medical attention which they could no longer afford because the syndication had not delivered what they told it would.

[4] The complainants approached this Office to assist them to recover some, if not all, of their capital.

B. THE PARTIES

[5] The first complainant is Mr Leslie John Raymond Wigmore, an adult male pensioner. The second complainant is Nora Barnath Wigmore, an adult female pensioner. Their full details are on record with this Office. The first and second complainant are married to each other.

[6] The first respondent is D Risk Insurance Consultants CC, a close corporation duly incorporated in terms of South African law, with registration number 2008/195574/23. The address of the first respondent's principal place of business is noted in the records of the Financial Sector Conduct Authority (FSCA), 60 Van Riebeeck Avenue, Edenvale, 1609. The first respondent has been registered as an authorised financial services provider (FSP) with licence number 12806 since 2004, and its license remains active.

[7] The second respondent is Deeb Risk, an adult male financial services provider. At all times material hereto, the second respondent rendered financial services to the complainants in his capacity as a representative of the first respondent. The second respondent's address is the same as that of the first respondent.

[8] In this determination, I refer to the respondents collectively as 'respondent' and where appropriate, I specify which respondent is being referred to.

C. THE COMPLAINT

[9] The complainants allege that in 2010, the respondent advised them to withdraw investments they had in the bank in unit trusts mainly, and to re-invest the withdrawn funds in Sharemax[1]. The complainants claim that prior to accepting this recommendation, they asked the respondent if the Sharemax investment was guaranteed, and claim that the respondent advised that it was.

[10] The complainants invested a total of R784 000 made up as follows:

First complainant – R50 000[2];

Second complainant – R364 000[3];

Second complainant – R150 000[4];

Second complainant – R220 000[5].

[11] The complainants were meant to receive an income from their investments and advised that while they received an income in respect of two of the investments, they stopped receiving this income in August 2010.

D. RESPONDENT'S VERSION

[12] On receipt of the complaint, this Office, in accordance with Rule 6 (c) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers (the Rules), forwarded the complaint to the respondent to afford him an opportunity to either resolve the complaint with the complainants, or to respond fully thereto. The complaint was sent to the respondent on 28 November 2012.

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1 Sharemax Investments Pty Ltd.
2 The Villa Retail Park Holdings Limited.
3 The Villa Retail Park Holdings Limited.
4 The Villa Retail Park Holdings 2 Limited.
5 The Villa Retail Park Holdings 2 Limited.

[13] The respondent in his reply (prior to addressing the allegations levelled against him by the complainants), raised a number of points *in limine*, and called for the complaint to be dismissed on account of these defences.

[14] In the first instance, the respondent requested that this Office decline to entertain the complaint due to a lack of jurisdiction, or to determine that it is more appropriate that the complaint be dealt with by a court of law. Alternatively, he requested that this Office grant him the opportunity to partake in a hearing, and submit documentation normally flowing from such formal proceedings.

[15] In response to the complainant's allegations regarding the financial service he rendered to them, the respondent confirmed that the complainants were well known to him. He first met the complainants during July 1978 following a referral. The respondent advised that the complainants needed investment advice, as well as assistance with their short and long term insurance needs. Following that meeting in July 1978, the respondent maintained a professional relationship with the complainants, which spanned a period of over 34 years. He continued to render financial assistance and advice to the complainants in accordance with their needs.

[16] The respondent claims however that it was the second complainant who contacted him in January 2010, indicating that she was not happy with her money market investment, *'as the interest rates were declining rapidly, as a result of the world recession increasing in severity'*. He also claims the second complainant was not willing to place her funds in a fixed deposit account again, and asked that he find her an alternative investment. This is when the respondent considered an investment in Sharemax.

[17] According to the respondent, the complainants wanted their capital to be invested in a product that would ensure they would receive an income and capital growth. The

respondent advised them that an investment in Sharemax could fulfil their requirements, and travelled to Cape Town to meet with them.

[18] During this meeting, the respondent discussed their entire investment portfolio with them, as well as the option of investing in Sharemax. The respondent claims that he mentioned the interest rate offered by Sharemax, the potential capital growth offered, and that investments in property were doing well and showing great returns. The respondent also claims that he 'fully explained' the Sharemax model to the complainants. He provided them with a copy of the registered prospectus for the syndication which he requested them to consider and to contact him, should they have queries. He recommended that the complainants invest in Sharemax based on information that was available to him at the time and based on additional research that he had done on the product.

[19] During February 2010, the complainants invested R364 000 and R50 000 respectively, upon receipt of proceeds from other investments. The respondent duly completed the blank cheques given to him during his consultation with the complainants, and submitted this together with the application forms that had already been completed.

[20] In May 2010, the second complainant informed the respondent that she had an additional R150 000 which she could invest. The respondent advised the complainant that investments into The Villa 17 were fully subscribed, and that a new prospectus into The Villa Retail Park Holdings 2 had been opened. Based on the information that the respondent provided to the complainant regarding the income to be received by investors into The Villa Retail Park Holdings 2, the complainant allegedly indicated that the investment was suitable to her. The complainants allegedly indicated that they were happy with the returns they were receiving from the investment in The Villa 17, and were set on investing in another property syndication scheme managed by Sharemax. The second complainant therefore again invested in Sharemax.

[21] During July 2010, the second complainant informed the respondent that she had a further R220 000 to invest in Sharemax, and as with her second investment, she invested in The Villa Retail Park Holdings 2. The respondent claims that she seemed adamant to invest in Sharemax, and he provided her with a copy of the prospectus relating to the proposed investment, for her consideration.

[22] The respondent denies that he should be held liable for the loss the complainants claim to have suffered for the following reasons:

22.1 He established the needs and circumstances of the complainants and determined that the risk in the investments in question was within their respective risk profiles.

22.2 He provided the complainants with the registered prospectuses for each of the syndications.

22.3 He recommended the product to the complainants after conducting a due diligence exercise.

22.4 He never furnished the complainants with any guarantees regarding the safety of the product.

22.5 The complainants have not made any allegations against him contending that he failed to act in terms of the FAIS Act or General Code of Conduct;

22.6 When he assisted the complainants with the investment, he was not aware of any questions regarding the legality of Sharemax, notwithstanding the investigations he conducted.

22.7 The complainants selected the investments with full knowledge and understanding, because he explained to them all the documentation regarding Sharemax and it was their decision to invest.

[23] According to the respondent, the above listed factors prove that the complainants have been unable to show that he is the legal cause of their loss and consequently, this Office cannot hold him liable.

E. INVESTIGATION

[24] After due consideration of this response, the Office accepted the matter for formal investigation by issuing a notice to the respondent in terms of section 27 (4) of the Financial Advisory and Intermediary Services Act[6] (FAIS Act) informing the respondent of its decision.

[25] In this notice, the respondent was advised that his response, as well as the documentation he submitted, where insufficient to demonstrate his compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code). The respondent was advised that the matter had consequently been accepted for formal investigation and was referred to various sections in the FAIS Act and the Code which this Office perceived he had breached.

[26] On account of these perceived breaches, this Office recommended that the respondent resolve the matter with the complainants. In the event he failed and / or refused to do so, the complaint would be resolved by way of a determination. The respondent was further called on to submit the information and documentation necessary to support his statements.

[6] Act 37 of 2002.

[27] The respondent did not settle the matter with the complainants. In response to the aforementioned notice, he did not offer any new information, but maintained that he was not the cause of the complainant's loss and that the complainant's were fully conversant with the nature of the investment. The respondent allegedly disclosed all the information relevant to the product to them, including the requisite information on the risks inherent in the product. The respondent also claimed that he had therefore discharged the duties placed on him by the FAIS Act and the Code and that the complainants were afforded the opportunity to make an informed decision prior to investing.

[28] In response to a further section 27 (4) notice, the respondent maintained his stance that he was innocent of any allegations that he acted improperly when rendering the financial service to the complainants. This Office allegedly failed to take into account his prior responses and questioned its impartiality, and its ability to act fairly and independently when adjudicating the matter. The respondent again asked that the matter be dismissed on the grounds that this Office lacked the jurisdiction to deal with it, given what the respondent termed as 'material disputes of facts' between the versions put forward by the complainants and the version which he offered in response to the complainants' allegations. The respondent also alleged that this Office, in failing to grant his request that the matter be dismissed in terms of section 27 (3) (c) of the FAIS Act, was in fact impugning on his Constitutionally protected right to have the dispute resolved by the application of law.

[29] Before concluding its investigation into the matter, this Office provided the respondent with additional information that had been gathered from the complainant, affording him an opportunity to respond. The respondent in his reply largely kept to his previous responses. In particular, the respondent again alleged that (a) this Office did not have the jurisdiction to adjudicate this matter because the submissions received from the complainants when lodging the complaint failed to meet the definition of 'complaint as

defined in section 1 of the FAIS Act and (b) that the complainants had failed to show that he was the causal link of the loss complained off. The respondent, only after having raised this, then set to address what this Office had in fact called him to address, that being the additional information gathered from the complainants in accordance with Rule 5(h) of the Rules.

[30] The additional information gathered from the complainants had been called for through a set of questions put to the complainants in which they were asked, *inter alia*, what their understanding of the investment product was, what the respondent had disclosed to them regarding the risks involved in the investment as well as what the source of the funds which were used in their investments were.

[31] In response to the answers received from the complainants to these questions, the respondent, apart from denying that he had informed the complainants, as they alleged, *'that there was absolutely no risk'* in the investment, and denying that the complainants were not fully apprised of the risks inherent in the investment, largely confirmed the information provided by the complainants or did not successfully questions its truth or authenticity.

F. DETERMINATION

In limine objections

[32] The respondent repeatedly alleged that this Office was not the appropriate forum to deal with this complaint. The reasons advanced by the respondent ranged from allegations that this Office had demonstrated an inability to be objective and impartial as it is mandated to be, and that there were material disputes of fact that could not be settled on paper, but which required an exchange of pleadings as well as cross-examination of witnesses and the hearing of testimony from expert witnesses.

[33] These allegations raised by the respondent are the same as those raised by him in previous matters brought against him to this Office and in which matters this Office found against him[7]. The respondent in fact repeated these allegations when he appealed the aforementioned findings of this Office to the Financial Services Tribunal (the Tribunal). In dealing with these allegations the Tribunal held that:

'In our judgement, no reasonable, objective and informed person could, on the correct facts, reasonably apprehend that the Ombud, would not bring an impartial mind to bear in the adjudication of the complaints against the appellants.'[8]

[34] The Tribunal therefore dismissed this *in limine* objection. The facts on which the respondent relied when he raised this defence in the Bujok and Oldacre matter are largely indistinguishable from those on which he has relied in this matter. In fact, the Tribunal had issued a single ruling in the Bujok and Oldacre matters, even though the matters were not *strictu sensu* consolidated. They found that the overlap between the respondent's arguments in those matters were so pronounced it '*rendered the writing of two separate judgements both illogical and inefficient.*'

[35] Consequently, I am satisfied that for the reasons advanced by the Tribunal in the Bujok and Oldacre matters, that the respondent's *in liminie* objection that this Office has shown bias towards him and that it can therefore not adjudicate this matter with the impartiality, independence and objectivity demanded of it, is dismissed.

[36] I turn now to consider whether this Office, as the respondent alleged, is incapable of adjudicating the matter because of the different versions presented by the complainants on the one hand and the respondent in response to the complaint on the other.

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7 D Risk Insurance Consultants CC and Another v Janet Ann Scott [FAB 19/2018] and D Risk Consultants CC and Another v Lionel Walter Oldacre v Another [FAB 18/2018.

8 *Ibid* at paragraph 25.

[37] In his request that this Office refuse to hear the matter and that it refer it instead to a Court, the respondent has relied on section 27 (3) (c) of the FAIS Act. Section 27 (3) (c) states that '*The Ombud may on reasonable grounds shown determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process and decline to entertain the complaint.*'

[38] What is clear from section 27(3) (c) is that it is for the party who requests that the matter be referred to a Court or any other available dispute resolution forum, to present to this Office reasonable grounds on which such request is founded and to support such a request.

[39] The respondent, in an apparent attempt to support this request has simply referred to the differences in the versions presented by the complainants and him on what transpired at the time the financial service was rendered. The respondent has simply alleged that these disputes are 'material' and that they 'cannot be resolved on the papers' without regard to the principles enunciated by the courts on what facts or information must be presented in order to determine whether a real dispute of fact exists and if a matter then, in fact, cannot be determined on the papers.

[40] These principles are trite, having been developed in 1949 in the *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[9] and repeated by the courts in many a judgements since.

[41] The Supreme Court of Appeal (SCA) in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[10] held that

[9] 1949 (3) SA 1155.

[10] [2008] ZASCA 6, 2008 (3) SA 371.

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.'[11]

[42] The SCA held further that *'bare denials are not acceptable where the facts deposed to lie purely in the knowledge of the litigant deposing to the answering affidavit'* and that '*each material averment must be met and answered appropriately not enveloped in a fog which hides or distorts the reality'*.

[43] Evidently, the respondent bore the duty to not only highlight that there are discrepancies that exist between the version presented by the complainants and that presented by him as cause for why this Office should refer the matter to a Court for hearing, or to allow for the hearing of oral evidence and for cross examination of the parties and any witnesses. The respondent was required to present to this Office, documentary evidence which would support his averments and thereby show that he had seriously and unambiguously addressed the fact or facts said to be disputed, as called for by the SCA, and had the opportunity to do this yet he did not.

[44] In any event, if the respondent was convinced (as he stated repeatedly in his responses) that the documentary evidence he presented to this Office refuted the complainant's allegations, why then would he hold the view that the matter cannot be properly adjudicated except through the hearing of oral evidence, the cross examination of the parties and witnesses, the presentation of pleadings and the calling of expert witnesses?

[45] In my view, the respondent has not presented any reasonable grounds to show that this Office does not have the jurisdiction or ability to adjudicate the matter and to thus

[11] Ibid at para 13.

persuade it to refer it to a court for hearing, as per his request. This point *in limine* is therefore also dismissed.

[46] Given that the *in limine* objections raised by the respondent have all been dismissed, I turn now to consider the merits of the complaint.

G. MERITS OF THE COMPLAINT

[47] The respondent's defences to the claims that he failed, when rendering the financial service to the complainants, to discharge the duties placed on him by the FAIS Act and the Code essentially turn on three things:

47.1 Firstly, the respondent claims that he assessed the product to be suitable to the complainants, given what their needs and circumstances were at the time and because of the information available to him then.

47.2 Secondly, the respondent claims that the complainants were placed in a position to make an informed decision because he disclosed to them all the information which was relevant and material to the product, including the information on the risks inherent in the product.

47.3 Lastly, the respondent claims that he cannot be held liable for the loss the complainants claim to have suffered because there was an *actus interveniens* that disturbed the link between the advice he rendered to the complainants, and the consequent loss suffered by them. The *actus interveniens*, according to the respondent, was the failure by those who managed the syndication, to act in accordance with the duties placed on them.

Risk

[48] Having considered the information provided, which includes the content of the records of advice, the complainants were seemingly persuaded by the respondent's advice to proceed with the investments on the grounds that it was a low risk investment, income

was guaranteed until a certain date, and the capital would not be guaranteed until the sale of the property.

[49] This I gleaned from the records of advice completed for each of the investments that the complainants made in terms of which records of advice, the respondent stated that an investment in Sharemax is "low risk".

[50] The prospectus itself however makes it clear that the shares on offer are unlisted, and an investment in Sharemax is a "risk capital investment". Contrary to the respondent's explanation, the complainants were not investing in a low risk investment. The complainants did not invest in a property itself, and it does not seem that it was explained to the complainants that they were lending their money to a company that did not own a property yet and that their money was in fact lent to a developer by means of an unsecured loan, to build the various 'The Villa' properties.

[51] The complainants acquired nothing other than debentures[12], or as captured in the Sharemax prospectus, a claim. A "claim" is defined in the prospectus as an "*unsecured subordinated floating interest rate acknowledgement of debt made by the company in favour of the shareholder".*

[52] That a recommendation to invest in Sharemax was negligent, was confirmed in the matter of *Oosthuizen v Castro.* The learned judge referred to the matter of *Durr v Absa Bank Ltd and Another*[13] when discussing the liability of an FSP.

"[27] The locus classicus is Durr supra. The Durr-judgment preceded the FAIS Act by several years, but notwithstanding that, the principles set out in Durr are still relevant and to a great extent accepted by the legislature if the wording of the FAIS Act is

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12 A debenture is used by companies to borrow money, at a fixed rate of interest. The debenture is a document that either creates a debt or acknowledges it. A debenture is a certificate evidencing the fact that the company is liable to pay a specified amount with interest. Although the money raised by the debentures becomes a part of the company's capital structure, it does not become share capital.

13 1997 (3) SA 448 (SCA)

considered. In Durr Schutz JA said the following on p 455 I-J: "Just about everything that Stuart told the Durrs about Supreme was wrong, not that he knew it, but because he had allowed himself to be misled, as many others also had been, by a series of deceits." The broker assured the plaintiff, Ms Durr, that the investment was entirely safe". (my emphasis)

[53] The complainants accepted the respondent's advice to invest in Sharemax on the basis that the investment was supposedly low risk, even though the prospectus states the exact opposite as far as risk is concerned. This in itself is negligent.

Suitability of the product

[54] By the respondent's own version, the second complainant contacted him because she was concerned that money she invested in a money market account, was declining. From this, it seems that the second complainant intended for the money to be placed in an investment that would protect and guarantee her capital, which the money market account could not do at the time.

[55] The respondent, who was fully conversant with the complainant's financial situation following their meeting in January 2010, assessed from the additional information gathered that the product which would best meet their needs, was an investment in Sharemax. This despite what he himself has referred to as the bold print on the opening pages of the relevant prospectuses.

[56] The respondent further claims that when he recommended the product to the complainants, he had to balance their needs and circumstances against their risk profile. The risk analysis conducted confirmed that both complainants were medium risk investors. The respondent claims that the complainants' risk profile accorded with the risk inherent in the product, and this is why he found it appropriate to recommend the product to them. I am at pains to accept this argument from the respondent because

he knew, even prior to meeting with the complainants, what product they sought. The complainants were interested in having their funds placed in a product that would guarantee their capital. The respondent then had no reasonable grounds on which to include, in his recommendations to the complainants, a product that could not achieve this.

[57] This was the view of the Tribunal in *Optimum Consultants (Pty) Ltd and Another v Margaretha E Lambrechts N.O. and Another,* where the Tribunal held that the appellant had to dissociate investments that were appropriate for the complainants from those that were not.

[58] The respondent, in an apparent attempt to distance himself from the decision taken by the complainants to follow his recommendation and to invest in Sharemax, claims that they 'would not hear of any other investment'. The respondent makes this claim, notwithstanding the fact that he was the one who suggested the product to them. They had no knowledge of it beyond what he had presented to them, and he was the complainants' trusted adviser for a period in excess of 34 years at the time he furnished the advice. In light of this, I do not see how the complainants would have thought to disregard the respondent's recommendation.

[59] Furthermore, section 8 (4) (b) of the Code requires that should a complainant fail to adhere to a recommendation made, that the complainant be advised as to the inherent risks, and that this transaction be recorded. Had the respondent adhered to this section of the Code, greater credence could have been given to his claims that the complainants would not hear of any other option, as he would have had a record that he had appropriately advised the complainants and placed them in a position to make an informed decision, despite their alleged unwillingness to consider any other options.

Replacement products

[60] Section 8 (1) (d) of the Code provides that where a financial product is to replace an existing financial product, wholly or partially, that the FSP has to fully disclose to the client the actual and potential financial implications, cost and consequences of such a replacement. The respondent has not provided any evidence that he complied with this section of the Code, other than a suggestion in the record of advice that "replacement can lead to further costs". What is meant by this, is not explained.

[61] Because of the respondent's lack of understanding of the Sharemax investments and his believe that such investments were low risk, he compared these high risk investments with money markets and unit trusts. The objective of a monthly income and capital guarantee could have been achieved by other, more traditional options. The respondent had an opportunity to disclose to the complainants that neither the income nor the capital was guaranteed and that they ran the risk of losing their capital. Instead, the respondent positioned the investment in Sharemax as being better than an investment in a unit trust or money market account.

[62] The complainants chose the investment as a result of of the information the respondent relayed to them, and because they were led to believe that contrary to the investment in the money market account, the Sharemax investment would provide greater security and certainty. This was however not true even at the time of the investment and this much was evident from the prospectus.

[63] Knowing this, the respondent should never have recommended the investment at all. He bore a responsibility to segregate investments that could not provide the complainants with what they needed from those that could[14]. His failure to do so in my

[14] Optimum Consultants (Pty) Ltd and Another v Margaretha E Lambrechts N.O. and Another at paragraph 44.

view, rendered him negligent in the discharge of the duties imposed on him by the Code and thus saw him breach the mandate that the complainants had given him.

Placed in a position to make an informed decision

[64] The respondent maintains that he gave the complainants copies of the relevant registered prospectuses and that he discussed these in detail with them. The respondent avers that the complainants knew what the terms of the investment were, that they would have been able to make an informed decision and that they in fact made an informed decision.

[65] The respondent makes this allegation notwithstanding the fact that he recorded in the record of advice that an investment in Sharemax was low risk and that he compared it to investments in a money market account and in unit trusts. The respondent advised that the former investment offered rates that were likely to drop in future while the latter may be subject to volatility.

[66] In contrast, the risks that the respondent recorded in relation to Sharemax were only that the investment was low risk, depending on the economic situation in the world and in the country, that all income was taxable, that the funds were not liquid until the property was sold and that a withdrawal in the first year was subject to a 5% penalty. The respondent had an opportunity then to disclose to the complainants that neither the income nor the capital was guaranteed and that the complainants ran the risk of losing their capital. Instead, the respondent positioned the investment in Sharemax as being better than an investment in a unit trust or money market account.

[67] The complainants, in my view, had no reason to doubt that this was true for a number of reasons including the long standing business relationship that the parties enjoyed and the assurance from the respondent that his recommendation accorded with their

needs. For the respondent to then rely on the fact that the complainants chose the investment is in my view insincere. They chose the investment because of the information he relayed to them and because they were led to believe that contrary to investing in a money market account, the Sharemax investment would provide greater security and certainty.

[68] In any event, it is important also that we consider whether or not the respondent provided the complainants with factually correct information as required in section 3 (1) of the Code, when disclosing the risks in the product he was recommending to the complainants. From the preceding paragraphs, it is evident that the information provided was not factually correct and the respondent cannot therefore be said to have appropriately advised his clients.

H. LEGAL CAUSATION

[69] For the reasons advanced above, it is evident that but for the advice that the respondent rendered to the complainants, they would not have concluded the investment into Sharemax and they would not have suffered any loss. However, whether or not the respondent should be held liable for the loss is, as the respondent himself has pointed out, dependent on whether the respondent was the proximate cause of the loss.

[70] The Supreme Court of Appeal, in *Flanagan v Minister of Safety and Security*[15] held that the test applied in determining legal causation is a trite and settled one and that '*it 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 come into consideration'*.

[15] [2018] ZASCA 96 (1 June 2018) at para 30.

[71] The respondent argues that he could not have foreseen that that there would be questions regarding the legality of the Sharemax model or that the Reserve Bank would intervene in its operations. He argues that no decision can be made regarding his now proven negligence, unless it is established whether or not the Sharemax model was illegal and what the cause of the non-payment was.

[72] The respondent's negligence lies in him having recommended a product that he did not understand, and that did not align with the complainants' needs. He therefore having acted contrary to the mandate given to him by the complainants, and breached the contract he had with his clients to render financial services with due skill, care and diligence. Regardless of Sharemax's track record and the raving reviews given by many financial services providers at the time he rendered the service, the risks inherent in the product remained clear.

[73] That investors ran the risk of losing their investments was a fact when the respondent furnished the complainant's with advice. The respondent knew to caution the complainants against other investments that could not guarantee that their capital would be protected, but did not do so with Sharemax, seemingly because he thought the risk so low that he did not envision that any real risk would materialize. The warnings in the prospectus however should have enlightened him to the fact that the risks were real and should have deterred him then from recommending the product.

[74] I am therefore of the view that the loss suffered by the complainants is sufficiently linked to the respondent's failure to render the financial service in the manner demanded of him to attract legal liability.

[75] On the question of whether or not the complainants have in fact suffered harm, I find that they have. It has been almost 4 years since the complainants' investments were meant to mature and for them to have received their capital back, yet this has not

happened. There is no indication of whether this will in fact happen, especially taking into account the ongoing legal battle between Sharemax and Capicol, the developer. The facts point to the probability that the complainants may never be able to recover their capital.

I. THE ORDER

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

1. The complaint is upheld.
2. The first and second respondent are ordered, jointly and severally, the one paying the other to be absolved, to pay to the complainants the amount of R784 000 made up as follows:
   2.1 To the first complainant the amount of R50 000; and
   2.2 To the second complainant, the amount of R734 000.
3. Interest is to be paid on the above amounts at a rate of 10% per annum from the date of determination to date of final payment.
4. Complainants are to cede their rights and titles in respect of any further claims in respect of this investment to the respondents.

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

DATED AT PRETORIA ON THIS THE 5th DAY OF JUNE 2019.

NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS