

OUR REFERENCE: FAIS 08301/12-13/ FS 1

FAIS 08303/12-13/ FS 1

27 November 2017

ATTENTION: Mr Willem Nienaber
Gariep Investment and Financial Planners CC

Per email: wjnienaber@telkomsa.net

Dear Mr Nienaber,

Brett Richard Giddy in his capacity as executor of the Estate Late Mr Neville Richard Emms Giddy & Mrs Veronica Giddy v Gariep Investment and Financial Planners CC and Mr Willem Jacobus Nienaber: RECOMMENDATION IN TERMS OF SECTION 27 (5) (c) OF THE FAIS ACT, (ACT 37 of 2002)

A. INTRODUCTION

1. On 30 January 2013, Mr and Mrs Giddy (the “complainants”) filed a complaint with this Office against Gariep Investment and Financial Planners CC and Mr Willem Nienaber (collectively referred to in this recommendation as the “respondent”). The complaint arose from failed investments made by complainants, on respondent’s advice, into two public property syndication schemes, namely, Witbank Highveld Holdings Limited¹ (Witbank Ltd), and Liberty Mall Holdings Limited²(Liberty Mall”), both promoted by Sharemax Investment (Pty) Ltd (Sharemax).
2. Respondent had been a financial advisor to the complainants since 2004 and had intermediated numerous transactions which included investments made with Liberty Life (Living Annuity), Stanlib and Allan Gray. The complainants claim to have limited knowledge of financial products and

¹ Registration number 2005/005417/06

² Registration number 2007/007383/06

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considered their relationship with respondent as having been a professional one which had been conducted in utmost good faith.

Delays in finalising this complaint

3. I find it important to address the delay in finalising this complaint. Sometime in September 2011, after the Office issued the *Barnes* determination³, the respondent in that matter brought an urgent application to set aside the determination⁴. Before the fate of the application could be known, respondents sought an undertaking from this Office that it would not proceed to determine any other property syndication related complaints involving them.
4. Since no legal basis existed for respondent's demands, the Office proceeded to determine further property related complaints, to which respondents responded with an urgent application for an interdict to stop the Office from filing the determinations in court, and issuing further determinations against them. The decision was finally delivered in July 2012 favouring the Ombud. See in this regard *Deeb Risk v FAIS Ombud & Others*⁵.
5. The Office continued to determine complaints involving property syndications after the High Court decision. However, in 2013, following the *Siegrist* and *Bekker* determinations⁶ and the relevant appeal, a decision was taken by the Office to halt processing property syndication related complaints. The decision was not taken lightly, but was a precautionary and necessary risk management step, as the Office had for the first time sought to hold the directors of property syndication schemes liable for complainants' losses. The said appeal was finally decided in April 2015⁷, after which the Office resumed processing complaints involving property syndications with due regard to the decision. As many as 2000 complaints had to be shelved pending the Appeals Board decision.

³ See *E Barnes v D Risk Insurance Consultants* FAIS-06793-10/11 GP 1

⁴ Respondent claimed, *inter alia*, that section 27 of the FAIS Act was unconstitutional

⁵ Gauteng High Court Division, case number 50027/2014

⁶ See in this regard FAIS-00039-11/12 and FAIS-06661-10/11.

⁷ See in this regard the decision of the Appeals Board date 10 April 2015.

B. THE PARTIES

6. First complainant is Brett Richard Giddy, in his capacity as Executor of the Estate late Mr Neville Richard Emms Giddy⁸. Second complainant is Mrs Veronica Giddy an adult female pensioner and widow of the late Mr Giddy. Her full particulars are on file with this Office. I use complainant/s in this recommendation interchangeably.

7. First respondent is Gariep Investment and Financial Planners CC, a close corporation duly incorporated in terms of South African law, with registration number (CK 1995/046743/23). The first respondent is an authorised financial services provider (licence number 15197) with its principal place of business noted in the Regulator's records as No.85 Somerset Street, Aliwal North, 9750. The licence has been active since 25 November 2004.

8. Second respondent Mr Willem Jacobus Nienaber (who is also a member, key individual and representative of first respondent) appears to have been fully licensed in his own right as a sole proprietor trading under the name and style of Willem Jacobus Nienaber, with license number 10646. Second respondent's address is noted in the Regulator's records as the same as that of first respondent. The licence has been active since 20 October 2004.

9. The documents furnished to this office by the complainant show that second respondent was acting both in his capacity as a sole proprietor and as a member and representative of first respondent. Both licence numbers appear in several documents furnished to complainant. At all times material hereto, second respondent rendered financial services to the complainant.

10. It appears from the Regulator's records that first Respondent was not licensed to render financial services in connection with unlisted shares and debentures, which are categorised as 1.8 and 1.10 respectively in the FAIS Act, when the recommendations to invest in Sharemax were made to complainants during 2005. It was only on 20 December 2006 that first respondent acquired these

⁸ in terms of the letters of executorship issued by the Master of the High Court dated (15/09/2015) with reference number (002852/2015)

two licence categories. Furthermore, the Regulator's records also confirm that second Respondent was not licensed to render financial services in connection with unlisted shares and debentures, which are categorised as 1.8 and 1.10 respectively in the FAIS Act, when the recommendation was made to the late Mr Giddy to invest in Sharemax. It was only on 8 September 2005 that second respondent acquired licence category 1.8 (described in the FAIS Act as Securities and Instruments: Shares). The recommendation made to second complainant to invest in Sharemax on 11 May 2007, was also done without second respondent having been registered for debentures in terms of category 1.10 (described in the FAIS Act as Securities and Instruments: Debentures and Securitised Debt). This additional category was only added to respondent's licence on 23 May 2007. Both licence categories are required to provide advice and an intermediary service with regards to Sharemax investments.

11. I refer to the respondents collectively as "respondent". Where appropriate, I specify which respondent is being referred to.

C. THE COMPLAINT

12. Following recommendations by respondents, complainants made a total of two investments, one in the name of first complainant and another in the name of second complainant, into two property syndication schemes, at various intervals. The investments were made as follows:

First complainant

12 April 2005 – R60 000 – Witbank Ltd.: The capital had been derived from the proceeds of a retirement annuity with Momentum Life that had matured. Complainant was advised that the capital would be guaranteed and that the investment, which would provide a monthly income of R450, must remain invested for a period of 5 years to ensure capital growth.

Second Complainant

11 May 2007 – R60 000 – Liberty Mall.: The capital had been derived from two policies with Old Mutual which had matured and which had paid out directly to second complainant. Once again complainant had been advised that the capital would be guaranteed and that the investment, which

would provide a monthly income of R450, must remain invested for a period of 5 years to ensure capital growth.

13. It is complainants' version that they the respondents told them that the amounts invested were repayable with a 30 day notice.
14. Complainants also understood that the investments made with Sharemax were in keeping with their established risk profile, which, according to the advice provided by respondent, saw them invest into Liberty Life's Excelsior Moderately Conservative Portfolio as well as into the Allan Gray Stable Fund.
15. Complainants claim to have never been provided with a copy of the prospectuses.
16. The complainant had initially addressed this matter with respondent, in accordance with Rule 5(b) of the Rules on Proceedings of the Office of the FAIS Ombud. Attempts to resolve the matter with respondent proved unsuccessful, and so complainants turned to this Office and requested that their capital be returned by respondent.

D. RESPONDENT'S VERSION

17. Respondents' response was received on 11 April 2103 following our Rule 6 (b) letter of 14 February 2013. The response is summarised below:
 - 17.1 Respondent confirmed that second complainant had sought advice from him on how to invest the proceeds of Retirement Annuity during March 2005. Respondent confirmed that there was no needs analysis carried out as complainant had a single need, which was to generate a monthly income with capital growth at a rate higher than that offered by the banks.
 - 17.2 The relationship between the first complainant and respondent began sometime in December 2004 when respondent was appointed by first complainant to be his financial

advisor. In terms of a record of advice prepared by respondent and dated March 2007 first complainant was identified as a moderate investor with a need to protect his capital

- 17.3 The respondent's record of advice identified second complainant as a conservative investor with a need to preserve capital. On 12 April 2005 second complainant met with respondent where respondent presented complainant with a recommendation that she invest in a Sharemax Income Plan. A further record of advice provided by respondent identified complainant as a moderate investor. It appears that complainant's risk profile had changed in one month from conservative to moderate. There is however no detail provided in respondent's record to substantiate the change.
- 17.4 In response to the complaints filed by the complainants, respondent advised that both clients had been fully informed of the nature and extent of the investments as well as the risks involved. Complainants also signed all documentation confirming the disclosures made and the acceptance thereof. According to the respondent, and contrary to what the complainants alleged, he had provided complainants with a prospectus and explained the contents of both prospectuses.
- 17.5 Respondent confirms that he *'determined that the risk in investing in Sharemax (as confirmed by the prospectus) was within the risk profile of Mr and Mrs Giddy taking into account their needs and circumstances.'*
- 17.6 In summary, respondent reiterated that it was complainants' decision to invest in Sharemax with full knowledge and understanding. He further argues he upheld his duties as an FSP in rendering financial services to the complainants.

E. **INVESTIGATION**

18. During July 2015, this Office sent notices⁹ to the respondent in terms of section 27 (4) of the FAIS Act, (the Notice) informing respondent that the complaints had not been resolved and that the Office had intention to investigate the matter. The letters read (omitting what is not material):

18.1 *'Property syndications are high risk investments for a number of reasons, because they are structured as unlisted companies, and the basis upon which the properties are valued are never fully disclosed.*

18.2 *Investors such as complainant are at risk as unlisted shares and debentures are not readily marketable; the value is also not readily ascertainable, and should the company fail, this may result in the loss of the investor's entire investment.*

18.3 *Was your client properly apprised of these risks? Please provide evidence to this effect. Only information provided to your client at the time of advice will be acceptable. In other words, we are looking for a record of advice, which must have been provided to your client at the time of rendering the service. An ex post facto account of what was said, will not be acceptable.*

18.4 *What information did you rely on to conclude that this investment is appropriate to your client's risk profile and financial needs? In this regard your attention is drawn to the provisions of section 8 and 9 of the General Code.'*

19. Respondent was invited to substantiate his answers with documents compiled at the time of providing advice to his clients.

20. Respondent replied to the Section 27(4) Notice on 3 September 2015. The response is summarised below:

⁹ Note that the complaints have since been consolidated to one complaint.

- 20.1 Without being specific, respondent pointed that there were material disputes of fact between his version and that of the complainants and urged that the matter should be referred to court.
- 20.2 The prospectuses of each investment were provided and explained to complainants, and that they had signed the application forms and the certificate titled "Risk Assessment and Product Information".
- 20.3 Referring to Section 4 of the Sharemax prospectuses, respondent made the point that Sharemax promoted each new investment opportunity by way of a new company and that the track record of Sharemax as a promoter illustrated to the potential investor the viability of the investment model.
- 20.4 The respondent was satisfied that a potential investor would know how the investment was structured and what to expect of the proposed investment companies set out in the prospectus.
- 20.5 Extracts from the Sharemax prospectuses were annexed to the response confirming the registration of the prospectuses by the then Companies and Intellectual Property Registration Office ("CIPRO") now CIPC, as further proof that Complainants understood the structure of the various syndications.

F. ANALYSIS

Disputes of fact

21. I have noted the statements by respondent that there are disputes of fact in this matter. I state however, that apart from making the claim, respondent made no attempt to identify those disputes of fact. In any event, this matter can be determined on the facts which are common cause and on respondent's own version. Furthermore, it must be borne in mind, that the Code in section 3 (2)

demands that providers maintain a record of all verbal exchanges with the client in relation to the financial service rendered. I have not found such a record in respondent's response.

22. In addition, the Code in section 9 further enjoins providers to maintain a record of advice which shall set out the products considered and the product/s recommended to the client, including reasons the recommended product is likely to meet the client's circumstances. The records called for by the Code are not only for the benefit of clients but for the providers rendering financial services. In circumstances such as these, the records would assist the provider.
23. In any event, the facts which are common cause establish that the respondent provided advice to the complainants. Prior to the provision of advice, both complainants had expressed the need to preserve their capital. In his recommendations to the complainants, respondent recommended the investments in Sharemax.
24. I highlight in the paragraphs that follow that respondent's advice was fundamentally flawed in that both schemes guaranteed neither the investor' capital nor the income payable. If anything, the prospectuses of both schemes made it plain that the investments were far too risky and in that case were unsuitable to complainants' needs.

The law

25. I deem it necessary to first refer to the relevant parts of the General Code, (the Code).
 - 25.1 Section 2, part II of the General Code of the Conduct (the Code) states that 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.
 - 25.2 Section 8 (1) (a) to (c) of the General 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 or any contractual arrangement..."*

Liberty Mall Prospectus

26. I refer to the attached annexures, being summaries of the prospectus of Liberty Mall and Government Notice 459 (Notice), as published in Government Gazette 28690. With these documents, I demonstrate that, despite respondent's claims of disclosing the risk, there was no basis for him to have recommended the high-risk Liberty Mall investment.
27. The prospectus does not hide the pervasive role of the promoter. Sharemax was the promoter, the company secretary, transfer secretaries, asset managers and property manager. Bearing in mind that there was no evidence that there was ever an independent board of directors, audit and risk, nor remuneration committees, the structure and arrangement of these companies, all of which appear to have been controlled by the same persons suggests that investors would have no protection whatsoever as the directors would only be accountable to themselves.
28. To emphasis the risk I point to paragraph 29.2 of the prospectus which notes that interest on the debenture component is unsecured and would be paid at a rate determined from time to time by the directors¹⁰.

¹⁰ Paragraph 9.3

Violation of Notice 459

29. Paragraph 19.10 states that all moneys received in terms of the offer would be administered in trust by the attorneys and received by the bank in a separate interest-bearing account opened and controlled by the attorneys for each and every applicant, in terms of section 78 (2A) of the Attorneys Act, **until (in respect of successful applicants) the minimum subscription is received and the immovable property has been transferred to Liberty Mall**. This was contrary to the requirements of sections 2(a) and 2(b) of the Notice, refer to annexure A3 a specifically paragraphs 3.3 and 3.4 respectively.
30. Notwithstanding the aforesaid, paragraph 5.11.3 in the prospectus states that upon payment of the purchase price into the attorney's trust account, an amount equal to 10% of the investor's capital would be released to Sharemax to pay commissions.
31. As a further indicator of how risky the scheme was, the directors of the Company had borrowing powers of 5% of the directors *'bona fide valuation of the consolidated property portfolio of the Company and its subsidiary, from time to time'*¹¹. No evidence exists that the respondent had taken any step to verify the valuation of the property with any other property valuer. Neither is there evidence of the date of such valuation. The risk of over-valuation was not excluded therefore, notwithstanding the potential harm to investors.
32. Paragraph 5.7.4 of the prospectus stated the following:
"payment of an amount of R9 238 432 being 4.61% of the said capital in a reserve fund to fund cash flow shortfalls on interest payments to investors. Investors expressed a need to earn higher yields on their investment initially by sacrificing on the escalations of their interest income in the years thereafter. The directors estimate the shortfalls which will be funded from this cash reserve to be as follows..... ". This simply confirms that the above average returns were unsustainable and this was evident from the start

¹¹ Paragraph 3.6

Witbank Limited prospectus

33. The directors of Witbank Highveld Holdings Limited (the company, into which complainant's funds were invested), were the same as the directors of the promoter, the property administrator and company secretary, Sharemax and Witbank Highveld, the company that owned the property¹²
34. There is no evidence that an independent board of directors ever existed in the entire group of Sharemax entities at the time, nor were there independent audit, risk and remuneration committees. No evidence of independent oversight existed, which makes the protection of investors questionable. The structure and arrangement of these companies, all of which appear to have been controlled by the same persons suggests that investors would have no protection whatsoever as the directors would only be accountable to themselves.
35. This should have raised concerns with the respondent especially when one considers the following:
- 35.1 The directors of the Company had borrowing powers of 5% of the directors' bona fide valuation of the consolidated property portfolio of the Company and its subsidiary, from time to time¹³. No evidence exists that the respondent had taken any step to verify the valuation of the property with any other property valuer. Neither is there evidence of the date of such valuation. The risk of over-valuation was not excluded, therefore, notwithstanding the potential harm to investors.
- 35.2 Interest on the debenture component will be paid at a rate determined from time to time by the directors¹⁴. Debentures that according to paragraph 29.3 were unsecured.
- 35.3 It is apparent from respondent's version that he had never had sight of audited financial statements of this company.

¹² Paragraphs 3.2 and 3.3.1 of the prospectus

¹³ Paragraph 3.6

¹⁴ Paragraph 9.3

- 35.4 Flowing from the lack of oversight arrangements by means of an independent board of directors, respondent did not know whether there were any internal controls, and the extent to which such controls would support reliance on financial statements produced by the entities within the Sharemax stable. Respondent therefore could not know whether the assets of the entities within Sharemax were properly recorded, and expenses accurately accounted for, so as not to inflate profits or understate losses.
36. The prospectus¹⁵ further states that the Company (Witbank Highveld Holdings Limited) intended to utilise the proceeds of the offer to:
- 36.1 Pay the purchase price in respect of the entire shareholding in Witbank Highveld, purchased from Sharemax for an amount of R22 591 100.
 - 36.2 Advance loan funding of R78 308 900 to Witbank Highveld for the purpose of purchasing the immovable property from Erf 5177 Middelburg Properties CC¹⁶ for R77 500 000.
 - 36.3 Create a reserve fund of R500 000 in Witbank Highveld for working capital.
 - 36.4 Pay a deposit in respect of electricity consumption to the local authority in the amount of R308 900.
37. Paragraph 12.3 confirms that the commission payable by Sharemax to its broker network will be made from the proceeds of the sale of shares between itself and the Company and would not exceed 10% on average of the syndication value. This was certainly not disclosed to complainants and marks a breach of the Code.

¹⁵ Paragraph 4.3 of the prospectus

¹⁶ Registration number 1994/031207/23

38. From the preceding paragraphs, one can rationally conclude that not only did respondent fail to appreciate that he did not possess the capabilities to assess the risk inherent in this product, he was happy to promote a product he did not understand to complainants. Even if complainants were provided with a prospectus, it is unlikely that they would have understood it, nor would they have appreciated the risk involved in the Sharemax investments.

G. FINDINGS

39. On the basis of the reasoning set out in this recommendation, the risks in the investment were not disclosed, in violation of Section 7 (1). The section calls upon providers other than direct marketers to provide *“a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision.*

40. Respondent further violated the Code in terms of section 8 (1) (a) to (c) and section 2. Information obtained during the investigation indicate that the two investments combined represented a significant portion of the complainant’s accumulated savings. Furthermore the late Mr Giddy was a retired farmer and second complainant, although a housewife, had been of retirement age, and they were at a time in their lives when they could least afford to sustain any loss of capital.

41. Respondent further failed to provide complainants with a recommendation that was appropriate to their needs and circumstances and despite conflicting claims that complainants had sought higher income and capital growth there is no indication that respondent had adhered to the provisions of section 8 (4) of the Code.

42. As a consequence of the breach of the Code, the respondent committed a breach of his agreement with complainant in that he failed to provide suitable advice. The respondent must have known that complainants would rely on his advice as a professional financial services provider in effecting the investment in Sharemax.

43. The representations made to complainant were incorrect and in violation of section 3 (1) (a) (vii) of the Code. There is no doubt that had the complainant been made aware of the risks involved in these investments, they would not have invested in any of the schemes.

H. CAUSATION

44. The question that must be answered is whether respondent's flawed advice caused complainants the loss. Had respondent complied with the Code and sought investments that were in line with complainants' circumstances, there would have been no investments in any of the schemes. Respondent must have known that his clients were going to rely on his recommendations in making the investment. It stands to reason that the respondents caused the complainants loss, which loss must be seen as the type that naturally flows¹⁷ from the respondents' breach of contract.

I. RECOMMENDATION

45. The FAIS Ombud recommends that respondent pay complainants loss in the amount of R120 000.
46. The respondents are invited to revert to this Office within TEN (10) working days with their response to this recommendation. Failure to respond with cogent reasons will result in the recommendation becoming a final determination in terms of Section 28 (1) of the FAIS Act¹⁸.
47. Interest at the rate of 10.25 % shall be calculated from a date TEN (10) days from date of this recommendation.

¹⁷ *Administrator, Natal v Edouard* 1990 (3)SA 581 (A); *Thoroughbred Breeders' Association of SA v Price Waterhouse* [2001] 4 All SA 161 (A), 2001 (4) SA 551 (SCA), paragraphs 46-49; Compare in this regard, *First National Bank v Duvenhage* [2006] SCA 47 (RSA).

¹⁸ *"The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include-*
(a) the dismissal of the complaint; or
(b) the upholding of the complaint, wholly or partially...."

Yours sincerely

A handwritten signature in grey ink, appearing to read 'M Alves', written over a light grey horizontal line.

Marc Alves
Team Resolution Manager