

**THE OFFICE OF THE FINANCIAL OMBUD FOR FINANCIAL SERVICES PROVIDERS
PRETORIA**

CASE NUMBER: FAIS 00493/13-14/ KZN1

In the matter between:

L LANDMAN

COMPLAINANT

and

JOHANNES CHRISTIAN MOSTERT

RESPONDENT

**DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FAIS ACT, ACT 37 OF
2002, (the Act)**

A. INTRODUCTION

[1] Complainant, on the advice of respondent, invested her late husband's pension into the Sharemax Zambezi investment. She claims she was advised by respondent that her funds would be safe with Sharemax.

[2] After consulting friends and family and having a conviction that the money should be invested in Momentum, complainant decided to invest in Sharemax, based on the assurances provided by respondent.

[3] When Sharemax stopped making interest payments, respondent took over and paid complainant on a monthly basis, albeit reduced amounts from the original amount paid by Sharemax.

- [4] Upon receiving word that complainant had sold her home and was able to live off the proceeds of the sale, respondent stopped payments to complainant.
- [5] It is complainant's contention that the investment in Sharemax was not in line with her circumstances. Respondent knew that complainant depended on the pension. When she lost her pension following what respondent had termed, a '*misunderstanding*' at Sharemax, complainant had no other option but to sell her home. Complainant states that it was inappropriate of respondent to advise her to invest in the Sharemax Zambezi product.
- [6] The principal issue therefore is, whether respondent, when furnishing advice to complainant, had done so in compliance with the FAIS Act and General Code of Conduct for Authorised Financial Services Provider and Representatives (the Code).
- [7] As set out fully below, I am satisfied that the respondent has failed to comply with the Code, in particular sections 2, 8(1)(a), (b) and (c) of Part VII and section 9.

B. THE PARTIES

- [8] Complainant is Mrs. L Landman, a 65 year old widow and pensioner, of KwaZulu Natal.
- [9] Respondent is Johannes Christiaan Mostert, an adult male, a sole proprietor and an authorised financial service provider ("FSP") in terms of the FAIS Act. At all material times, complainant dealt with respondent.

[10] The regulator's records indicate that respondent was licensed on (22/12/2004) and was not licensed to render financial services in terms of licence categories 1.8 and 1.10, which pertain to shares and debentures, and such license is (5553).

C. FACTUAL BACKGROUND

[11] In or about 2003, complainant's husband passed on while working at Spoornet. Complainant, fearing that she was not knowledgeable in the area of investments, sought advice from respondent on how best to manage the proceeds of her late husband's life savings.

[12] Her view was that the money should be invested in Momentum. It is respondent who assured complainant that Sharemax Zambezi Retail Park Holdings Ltd ("Sharemax") was the correct way to invest her late husband's savings.

[13] Respondent promised and guaranteed complainant that her funds would be safe and that complainant could look to capital growth after five years, even if she withdrew the interest on a monthly basis.

[14] It is complainant's version that respondent was clear of his facts as, according to complainant, he worked with these types of things everyday as a financial advisor. On this basis, complainant entrusted respondent with her savings.

[15] Having received assurance from respondent about the safety of her funds, complainant made the investment into Sharemax Zambezi in the amount of R650 000.

[16] On 06 May 2008, Sharemax issued complainant with a share certificate reflecting ownership of 650(six hundred and fifty) unsecured shares of R 999,99 (Nine hundred and ninety nine rand ninety nine cent) per share.

[17] For the purposes of this determination, the investment date shall be 6 May 2008.

[18] During July 2010, respondent informed complainant that there was a problem with Sharemax; she would no longer receive her monthly interest.

[19] Complainant's last interest payment was on 30 June 2010. However, respondent undertook to pay an amount of R5000, monthly, until the '*misunderstanding*' at Sharemax had been sorted out.

[20] Although the R5000 was R416 short of the amount complainant had been receiving from Sharemax, complainant nonetheless agreed to the suggestion.

[21] It appears that respondent could not honour the arrangement. Instead he paid complainant a reduced amount of R4000 monthly.

[22] During 2012, respondent was only able to pay complainant R 3 500.00 (**three thousand five hundred rand**) per month.

[23] The reduced amount of R3500 meant that complainant could no longer meet her monthly expenses.

[24] In March 2012, complainant was forced to sell her home of 39 (thirty nine) years. At the time of filing this complaint, complainant was renting a single bedroom flat at the rate of R 3000.00 (Three thousand rand) per month.

[25] At about the same time, respondent stopped the monthly interest payments. It appears from the complaint that respondent had gotten news that complainant had sold her home.

[26] As the proceeds of the house is the only capital complainant has, she claims she will be stranded when the amount is depleted.

D. THE COMPLAINT

[27] Complainant submitted (in February 2012) a comprehensive statement detailing the critical events that underpin the investment she made into Sharemax. What is discernible from complainant's statement is:

27.1 Complainant was persuaded to invest in Sharemax by respondent.

27.2 She trusted the "*expert*" opinion of respondent.

27.3 Since not receiving income from 2010, she is now of the view that she has lost the funds.

27.4 Complainant attributes the loss to respondent's advice;

27.5. Complainant claims that respondent's advice was flawed and that the risk involved in Sharemax was not suitable to her circumstances.

E. RELIEF SOUGHT

[28] Complainant seeks payment in the amount of R 650 000.00 (**six hundred and fifty thousand rand**) from respondent.

F. RESPONDENT'S VERSION

[29] On 6 September 2013, in compliance with Rule 6(b) of the Rules on Proceedings of the Office of the Ombud ("Rules"), the office referred the complaint to respondent advising respondent to resolve the complaint with his client. Respondent's response was due on 18 October 2013.

[30] The complaint not resolved, the office on 29 June 2015, emailed a notice in terms of section 27(4) of the FAIS Act, (the notice) to respondent.

[31] The notice amongst other matters communicated therein, required respondent to provide all relevant documentation which demonstrated compliance with the General Code of Conduct. Respondent's attention was further drawn to the following:

(i) *The prospectuses of both the Villa Retail Park Holdings and Zambezi Retail Park Holdings declare that the respective entities have never traded prior to the registration of the prospectus, have not made any profit whatsoever and are still under construction.*

In the circumstances how did you expect the income to be paid, other than out of investors' money?

(ii) *The prospectuses refer to the investment as being in an unsecured subordinated interest rate acknowledgement of debt linked to a share, which share was in an entity still under construction.....*

Given the preceding paragraph please advise as to why you considered the investment to be anything less than a risky venture, without any substance to its guarantee on interest payment?

[32] It was further communicated to respondent that in the event he failed to respond, the Ombud would, after investigating the complaint, make a determination with the information at her disposal, without any further reference to respondent.

[33] Respondent did nothing until 2 July 2015, when respondent's attorneys addressed an email to the office, in which they undertook to provide respondent's response by 31 July 2015.

[34] As a matter of fact, respondent and his attorney, have to date not furnished this office with their response.

G. DETERMINATION

COMPLAINT NOT BROUGHT BY THE COMPLAINANT IN COMPLIANCE WITH RULES

[35] Before I deal with the merits of this complaint, it is appropriate that I deal with the question whether complainant, by failing to first resolve the matter with respondent, is precluded from filing the complaint with this office.

[36] I am alive to the fact that there is no record that complainant had first brought the complaint to respondent's attention, in order to afford respondent the opportunity to resolve same before referring it to this office.

[37] Rule 5(b) provides as follows:

"[5] Rights of complainants in connection with complaints

(b) Before submitting a complaint to the office, the complainant must endeavour to resolve the complaint with the respondent..."

[38] The provisions of Rule 5 (b) seem to be straight forward. Complainant must endeavour to resolve the complaint with the respondent before submitting the complaint to the FAIS Ombud.

[39] The purpose of this provision is to avoid unnecessary costs. In the event respondent resolves the complaint with complainant, there would be no need for the FAIS Ombud's intervention.

[40] The question to be answered is, now that complainant has not afforded respondent an opportunity to resolve the complaint, does this preclude the FAIS Ombud from considering the complaint and make a determination? Simply put, should non-compliance with the provisions of Rule 5(g) be visited with nullity?

[41] The answer is no. The authorities clearly say that what matters is substantial compliance with the legislative provision in such a manner that the objects of the statutory instruments concerned have been achieved. In **Liebenberg NO and Others v Bergrivier Municipality**¹, the Constitutional Court, referring to three other cases, held as follows:

*“[22] The applicants contend that the Municipality failed to comply with various statutory prescripts in respect of the rural levies and property rates imposed. The Municipality submits that, should this court conclude that there were instances of such non-compliance on its part, then this should not necessarily result in the invalidity of the rates imposed. **Rather, the test should be whether there has been compliance with the relevant***

¹ 2013 (5) SA 246 (CC), par 23-26

prescripts in such a manner that the objects of the statutory instruments concerned have been achieved.

[23] In **Unlawful Occupiers, School Site v City of Johannesburg**, the Supreme Court of Appeal stated:

'(I) It is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved.'

[24] This was amplified by the Supreme Court of Appeal in **Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others** where it was stated:

'It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it.'

[25] In **African Christian Democratic Party v Electoral Commission and Others**, this court, in the context of assessing a local authority's compliance

with municipal electoral legislation, held that '(a) narrowly textual and legalistic approach is to be avoided'. Rather, the question is whether the steps taken by the local authority are effective when measured against the object of the legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular.

[26] *Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole...*"

H. ISSUES

- i) Whether respondent, in rendering financial services to complainant, violated the Code and the FAIS Act in any way. In specific terms, the question is whether complainant was appropriately advised, as the Code demands?
- ii) In the event it is found that respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of;
- iii) Quantum

Whether complainant was appropriately advised by respondent?

[42] In its simplest terms, the complaint is that, respondent had persuaded complainant to invest her pension in Sharemax. As the Respondent held himself out to be an "expert" in these investments, complainant relied on and trusted his advice. As a

result of respondent's advice, complainant invested her pension money, which she has now lost. The investment was made as a result of the respondent's poor advice, which failed to take into account the high risk involved in the Sharemax investment.

I. LEGISLATIVE FRAMEWORK

[43] It is appropriate at this stage to sketch out the applicable provisions of the FAIS Act and General Code of Conduct, (the Code) which are relevant in the present matter.

[44] Section 16 of the FAIS Act provides:

'(1) A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of such code to-

- (a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;*
 - (b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;*
 - (c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;*
- (2) A code of conduct must in particular contain provisions relating to-*

- (a) *the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;*
- (b) *adequate and appropriate record-keeping;*

J. GENERAL CODE OF CONDUCT

[45] Section 2, of Part II of the General Code provides:

“[2] 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.”

[46] Section 8(1) of the General Code of Conduct provides that a provider 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 purpose of the advice, based on 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; and....”*

K. ABSENCE OF RESPONDENT'S VERSION

[47] It is abundantly clear that the FAIS Ombud did everything in its power, in compliance with the FAIS Act, to seek respondent's side of the story in respect of the complaint.

[48] When called upon to put his version against the allegations contained in the complaint by means of the two notices² in terms of section 27(4) of the FAIS Act, respondent failed to do so. This is even after respondent had made an undertaking through his attorneys on 31 July 2015 that he will furnish his response.

[49] In the emails dated 06 September 2013 and 29 June 2015, attaching the section 27(4) letter, respondent was invited to provide all relevant documentation which informed the recommendation of this investment.

[50] For the record, respondent was asked to produce any record of advice reflecting the nature and process he followed in advising complainant. Respondent failed to produce same. It is therefore not known what informed respondent that the Sharemax investment was suitable to complainant's circumstances. See in this regard section 8 (1) (a) to (c) of the Code.

[51] Respondent has further not bothered to provide reasons for failing to respond to the complaint.

[52] Given the circumstances of this case, I am unable to disregard the version of the complainant. In this regard the matter of **DA MATA v OTTO, N.O**³ is instructive.

²on 06 September 2013 and 29 June 2015 respectively,

³ 1972 (3) 858 (A), at 869 B-E

[53] Van Blerk JA, dealing with the approach to be adopted when deciding probabilities, said:

'In regard to the appellant's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the only witness who could have disputed them had died – they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p. 260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantitative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:

"It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts – testimony which no sensible man can believe – goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded."

[54] The Respondent's conduct contravened Section 8 (1) as no proof has been furnished to this office that the provider had carried out his duties as stated therein, prior to advising complainant on this product.

Did respondent's conduct cause the loss complained of?

[55] Based on complainant's version, the investment in Sharemax Zambezi was made as a result of respondent's advice. Thus, absent respondent's advice, there would be no investment in Sharemax Zambezi.

[56] Outside of the complainant's version, there is no evidence pointing to respondent's adherence to the law. The information at this office's disposal points to the following conclusions:

- (i) Had respondent followed the Code, he would not have recommended an investment in Sharemax Zambezi. Being acutely aware of complainant's circumstances, he would have found an investment that is commensurate with complainant's circumstances;
- (ii) When respondent recommended the investment in Sharemax, he could not have been acting in complainant's interest. For one, there is no evidence suggesting that respondent knew what paid the investors' interest, given that the properties were being constructed;
- (iii) There is no evidence that respondent had conducted due diligence on the Sharemax investment. This means, respondent had no idea what he was inviting complainant to, when he recommended the Sharemax investment.
- (iv) There is no evidence that respondent was aware of the risk involved in Sharemax. These include the lack of apparent safe guards to protect investors against director misconduct; the lack of visible governance arrangements; and the complicated structure of investment itself, which left the investors with no protection.
- v) It is improbable that complainant, given her circumstances, would have off her own bat, invested into Sharemax without respondent's advice.

[57] Respondent's conduct caused complainant's loss.

L. FINDINGS

[58] On the undisputed facts before me, I make following findings:

- 58.1. I accept the uncontroverted version of the complainant.
- 58.2. Respondent advised complainant to invest R 650 000.00 (**six hundred and fifty thousand rand**) in Sharemax Zambezi Retail Park Holdings Ltd without first assessing the financial needs, conducting an analysis and determining the risk profile of complainant, thereby contravening Section 8(1)(a),(b) and (c) of Part VII of the General Code of Conduct.
- 58.3. Respondent has failed to render financial service honestly, fairly with due skill, care and diligence and in the interest of client and integrity of the financial services industry, thereby contravening Section 2 of Part II of the General Code of Conduct.
- 58.4. Respondent failed to maintain his records of advice as required by section 9 of the Code.

M. QUANTUM

[59] Complainant invested an amount of R 650 000.00 (**Six hundred and fifty thousand rand**) in Sharemax Zambezi Retail Park Holdings Ltd. There are no prospects of ever recovering the money from Sharemax.


[60] Accordingly, an order will be made that the respondent pay to complainant an amount of R 650 000.00 (**Six hundred and fifty thousand rand**) plus interest.

N. THE ORDER

[61] I make the following order:

1. The complaint is upheld.
2. Respondent is ordered to pay the complainant:
 - 2.1 The amount of R 650 000.00 (**Six hundred and fifty thousand rand**).
3. Interest on the amount of R 650 000.00 (**Six hundred and fifty thousand rand**) at the rate of 10.25% per annum from the date of this determination until payment.

DATED AT PRETORIA ON THIS THE 5th DAY OF MAY 2016.



NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS