IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case No: TPM FAIS 00493/13-14/KZN 1

In the matter between:

L LANDMAN **Complainant**

And

J C MOSTERT **Respondent**

DETERMINATION IN TERMS OF SECTION 28 (1) of the FAIS ACT 37 of 2002 (the Act)

A. INTRODUCTION

[1] On 5 May 2016, this Office upheld a complaint made by the complainant and directed the respondent to pay her an amount of R650 000 plus interest. This amount represented an investment made by the complainant with the assistance and advice of the respondent.

[2] The respondent made an application for leave to appeal to the former Board of Appeal[1] (now referred to as the Tribunal) alleging, *inter alia*, that he was treated unfairly due to the fact that this Office failed to consider his version of the facts. After investigating the matter, this Office found that due to an error in administration, the respondents' responses to the complaint was filed incorrectly, and the determination was made on the basis that the respondent had elected not to respond.

[1] The Board of Appeal was replaced with the Financial Sector Tribunal, effective 1 April 2018

[3] When the error was discovered, this Office deemed it appropriate to grant leave to appeal, and to recommend that the Board set aside the determination and refer the matter back to this Office. On 25 January 2018, the Board set aside the determination and made the following order:

"…….As a result of our conclusion the appeal on the prescription issue cannot succeed and is dismissed, the following order is granted: -

[25.1] The appeal is upheld;

[25.2] The determination made by the Ombud on the 5th of May 2016 is set aside;

[25.3] The matter is remitted back to the Ombud for further consideration…"

[4] In making the above order (with the exception of the prescription issue), the Board did not comment on, nor make any findings on the merits of the matter as set out in the determination that was set aside. However, it was conceded that the determination was made in the absence of a full response from the respondent.

The Record

[5] At the time of writing this determination, the following must be noted:

5.1 All the details of the complaint were delivered to the respondent. This includes a comprehensive statement from the complainant.

5.2 All the information available to this Office was delivered to the respondent.

5.3 There are no facts available to this Office, relevant to this matter, which was not made available to the respondent.

5.4 The respondent, through his attorney, made a comprehensive response supported by documentation; and

5.5 All of the respondent's submissions, both in respect of fact and law, were made available to this Office for purposes of investigation and determination.

B. THE PARTIES

[6] The complainant is Mrs Leonie Landman, a 68-year-old pensioner whose particulars are on file with the Office.

[7] The respondent is Johannes Christiaan Mostert, an adult male financial services provider, (FSP 5553) in terms of the FAIS Act.

[8] The regulators records show that the respondent was licensed on 22 December 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.

C. THE COMPLAINT

[9] The complaint is that the respondent advised the complainant to invest in a financial product that was not suitable for her, bearing in mind her financial needs and tolerance for risk.

D. THE ISSUES

[10] The issues for investigation and determination amount to this:

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

10.2 Did the respondent actually comply with the provisions of the following sections of the Code:

Section 3 (1) (a) (i) and (iii), section 7 (1) (a), section 8 (1) (a) and (c), and section 8 (2).

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

10.4 Did the complainant suffer loss and if so, what was the cause of the loss and the quantum thereof.

E. FACTUAL BACKGROUND

[11] The complainant's husband passed away during 2003, and the proceeds of his pension was made available to the complainant. She is a layperson and knew nothing about financial investments and products. Her money, an amount of R650 000 was held at Spoornet (Transnet) as a pension. She sought advice on how to deal with these funds, as it was all she had and the funds had to sustain her for the rest of her life. She was unemployed and had no prospect of finding employment. She had no means to replace the money, should she lose any or all of it.

[12] The complainant approached the respondent for advice. He initially advised her to take the whole amount and invest it, rather than leave it at Spoornet. The funds were then invested in Momentum. After a lapse of five years, the respondent advised her to invest in Sharemax. The complainant indicated she was "very scared" to do so and told the respondent she would rather re-invest in Momentum.

[13] The respondent explained that Sharemax had better benefits and gave a higher monthly income. The respondent assured her that he dealt with "these types of things every day" and guaranteed that her "money will always be safe". The respondent assured the complainant she will get back more than what she put in after five years, and she can draw her monthly interest.

[14] The complainant eventually agreed to invest in Sharemax as she "trusted Mr Mostert's opinion as an expert". The complainant states that she could not afford to lose the money and the respondent knew this. Of significance is the following statement by the complainant:

"What I did not know was that an investor should actually invest something like this in two or three different investments so as to prevent, in this case, that one loses everything. I did not know it then, but Mr Mostert works with investments on a daily basis and should have known this".

[15] It is not disputed by the respondent that he was aware of the complainant's financial circumstances, and that she was not in a position to lose any part of her investment.

[16] The respondent advised the complainant to invest in Sharemax Zambezi Retail Park Holdings Ltd (Sharemax). The whole amount of R650 000 was invested in April 2008.

[17] During July 2010, the respondent informed the complainant that Sharemax had problems and will not be paying monthly interest anymore. The complainant described this news as "devastating". She had herself and her grandson to support, and now found herself destitute.

[18] The respondent offered to pay her R5000 per month until the "misunderstanding" was sorted out. This amount was R416 less than what Sharemax paid, but the complainant states that she was nevertheless grateful to receive this money. The payments later decreased to R4000 per month, until it reduced to R3500 monthly. By this time, (March 2012), the complainant could not survive on this money and was forced to sell her property to raise funds. She had to send her grandson away, as she could not afford to support him. This was traumatic for herself and her grandchild (she had raised him since he was six months old).

[19] The complainant had to sell her home on a forced sale basis, and moved into a one bedroom "granny flat". She had lived in her home for 39 years. When the respondent found out that she sold her house, he stopped paying money into her account.

[20] The interest from the proceeds of the sale was not enough for her to survive and she was forced to draw from the capital on a monthly basis. The complainant now faces the prospect of depleting her capital, after which she expects to be destitute in her old age. The complainant believes that she received inappropriate financial advice from the respondent.

[21] The respondent advised her to take the matter to this Office.

F. RESPONDENT'S RESPONSE

[22] After the complaint was referred to the respondent, a comprehensive response was delivered with the assistance of his attorney. This response came in two forms:

22.1 In a declaration submitted by the respondent dated 24 October 2013; and

22.2 A further declaration pursuant to correspondence from this Office dated 29 June 2015.

The Principle Defences

[23] The respondent's attorney, as is his practice, merely copied and pasted the various submissions from previous responses made on behalf of other clients. As a result, this Office has dealt with them in numerous other determinations. Accordingly, I do not intend to traverse all the defences raised by the respondent; but will concentrate on his main defences and in particular those defences that relate to the peculiar facts of this case. I refer to a determination, where the facts are similar, and involves this respondent: *Maria Catherina Van Wyk vs Johannes Christiaan Mostert*[2]. Here I comprehensively dealt with all of the defences raised by the respondent herein.

[24] A further relevant observation is that the respondent's defence is based principally on the contents of the prospectus and documents, generated by Sharemax, which the complainant signed on making the investment. Virtually all of the respondent's explanations come from his "understanding" of the prospectus, which he uses as a point of reference. This Office must, in the circumstances, assume that this was his understanding of the prospectus and the nature of the investment at the time when he advised the complainant to invest. Bearing in mind that if this is an *ex post facto* understanding, then his submissions would be irrelevant to this dispute.

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[2] FAIS-02955-11/12 KZN 1

The Main Defences

[25] Having read the respondent's lengthy responses, the following represents their main points:

25.1 The risks were explained to the complainant, who confirms this by her signature in the contract, disclosure document and access to the prospectus.

25.2 The Sharemax product was appropriate, as the complainant wanted a better monthly income.

25.3 The prospectus was evidence of Sharemax's good record and the viability of its business model.

25.4 The prospectus provided an explanation as to how Sharemax was going to pay investors returns; and

25.5 The prospectus showed why this was a viable investment.

[26] Before dealing with the details of these submissions, I first dispose of an application in terms of section 27(3) (c) of the FAIS Act.

Fair Process and Application in terms of Section 27 (3) (c)

[27] The respondent submits that there are disputes of fact that cannot be resolved except through an adversarial hearing. In this regard, the respondent applies for the matter to be referred to a court of law, alternatively that a hearing be held in this Office.

[28] I applied my mind to this and find that this is not a matter that can appropriately be referred to a court. If this Office refers matters to court merely upon request of the respondents, then that will defeat the whole purpose of this Office and even undermine its legislated mandate.

[29] As will appear in this determination, the matter can be resolved on the undisputed facts between the parties. The respondent was given ample opportunity to place all his facts on record and to use the services of experts. The respondent took this opportunity and

filed lengthy declarations and copious documentation, including an explanation of his version of the disputed facts. The respondent also presented the opinions of three experts to support his case.

[30] In the premises I refuse the respondent's application to refer this matter to court and similarly decline to hold an adversarial hearing in the Office. I must point out that the respondent's attorney, as a matter of routine, attacks the fairness of the processes in this Office. The attorney took this attack to the Board of Appeal and the High Court and was met with failure every time: See *Deeb Risk* judgement and *Siegrist* judgement. In particular, see *J G Financial Service Assurance Brokers v R L Prigge*[3]. The Tribunal found that all of the grounds raised by the respondent that the process in this Office is unfair were baseless and dismissed them. This is what Harms J stated:

"Eventually, the fairness of the procedure adopted in a particular case will depend on the facts of the case and the nature of the disputes. The submission that a fair process requires at least a charge sheet, a statement of claim, a hearing where cross-examination may take place and legal representation is in principle and in the light of the provisions of the Act simply incorrect and is rejected."

[31] This did not stop the respondent's attorney from proceeding with the same fruitless attacks. Within this context, I refer to a recent ruling of the Tribunal in the matter of *Koch and Kruger Brokers CC and others vs D S Van Rooyen*[4] where Harms J stated the following regarding the respondents attorney:

"The time has unfortunately arrived to inform the instructing attorney that too many of the applications that emanate from his office are, prima facie, vexatious and amount to an abuse of process. The issues raised in this application have nearly all been raised in previous applications and appeals - unsuccessfully. The applications are on a

3 Case no FAB 8/2016, judgement of Harms J paragraphs 26 to 33.

4 Case no FAB 40/2018

template and more often than not deal with generalities and not with the particular facts of the case. The application is dismissed".

It is with a great deal of reluctance that I have to say the same about the response to this complaint.

[32] Here, I must deal with another ground relied on by the respondent to submit that this complaint be referred to court. The respondent speculates that the FSCA and South African Reserve Bank could possibly have contributed to the complainant's loss through regulatory failure, which allowed the Sharemax scheme to be marketed to the public. The respondent states that there may be a claim for an apportionment of damages against these institutions, which claim cannot be made in these proceedings.

[33] There is no merit in this submission. I am not required to comment about the merits of any claim the respondent may have against the Regulators. It is further inappropriate for me to refer this matter to court only because there is a speculative claim, on the respondent's own version, of a possible apportionment of damages. Should he respondent wish to seek an apportionment or an indemnity from these institutions, he should pursue the matters in court.

Prescription

[34] The respondent submitted that this Office should decline to investigate this complaint, as it had prescribed in terms of section 27 (3) (a) (i) of the Act. This defence can be disposed of immediately, as the Tribunal already ruled against it. I refer to the Tribunals order quoted in paragraph [3] above.

Sharemax Track Record

[35] The respondent submits that the complainant was aware of Sharemax's impressive track record. The information is contained in the prospectus and explains how Sharemax promotes each new investment opportunity by way of a new company which has not traded before. This fact, according to the respondent, illustrates to the investor

the viability of the investment model as set forth in the prospectus. In his response, the respondent then makes the following vague statement:

"Mrs Landman certainly understood the structure, she knew this structure, she knew that Zambezi was incorporated with the specific purpose as a structure for the proposed property syndications." Even the respondent, with the assistance of his attorney, does not explain what is meant by the underlined words.

[36] This very point, made by this attorney, was dismissed by the Tribunal in a judgement[5] by Harms J who stated as follows:

"The problem with Storm's reliance on other Sharemax schemes is that the Villa and Zambezi schemes differed from the earlier schemes. They, it would appear, related to the syndication of income earning properties. These two did not". (emphasis added).

[37] On a reading of the prospectus, it pointed out that Zambezi was still undeveloped and Sharemax had no independent source of revenue to pay investors their promised monthly returns and to fund the cost of building the Shopping Mall. Sharemax intended to use investor funds to do so. There is absolutely no record of advice, nor any other record that this fact was explained to complainant by respondent.

[38] It is an undisputed fact that the respondent agreed to give the complainant financial advice, and was therefore obliged to explain the aforesaid to the complainant. Moreover, section 3 (1) (a) (i) of the Code requires that an FSP, when rendering financial advice, representations made and information provided:

"must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client"; (emphasis added)

[5] See CS Makelaars, paragraph 33

[39] On a balance of probabilities, the complainant would not have agreed to this investment, had this been explained to her. She was certainly incapable of reading the prospectus and understanding the scheme, bearing in mind her level of knowledge.

[40] The key question now arises that, if the respondent did understand the prospectus, he would have known about Sharemax's funding model. How then did it come about that he nevertheless found the investment to be suitable for the complainant, bearing in mind her zero tolerance for risk? I deal with this in more detail below.

The Investment Model

[41] The respondent points out that this Office's finding that Zambezi was structured in such a manner that investors actually paid for the development costs, as well as their own monthly returns from their own funds as being *"not only factually incorrect but does not accord with the commercial reality and the contents of the prospectus".*

[42] It is an undisputed fact that the prospectus, in a convoluted fashion, explains how investor funds will indeed be used to fund the development and monthly interest payments. There is absolutely no basis for respondent to dispute the very contents of the prospectus he relies on.

[43] In this regard, I refer to the former Appeals Board's judgement in the matter of *CS Makelaars*, where Harms J dealt with the structure of the Zambezi and Villa investment. I refer to paragraphs 31 to 41 of the judgement. The Board accepted that investors were paid out of their own funds and that their funds were used to make an unsecured loan to the developer.

[44] I also refer in this regard to the matter of *Oosthuizen v Castro*[6]*,* where Daffue J noted the following:

[6] Case number 2858/2012, High Court, Free State Division, paragraph 50-60

"[56]I agree with Mr Heystek's testimony that all initial payments – at least until income is eventually received from tenants - would have to be paid out of funds put in by investors themselves. Investors therefore paid their or other investors' interest. There were no other sources of income during the construction phase of The Villa. The underlying property – the half-built shopping complex could not produce income on a monthly basis as investors and plaintiff in particular expected. Defendant was in breach of his fiduciary duty towards plaintiff in that he did not take reasonable steps to satisfy himself of the safety of the Sharemax investment".

[45] The respondent inappropriately offers to make a *"complete copy of the prospectus relating to Zambezi"* available to this Office. From this one can safely assume that the respondent instructed his attorney with a "complete copy" of this prospectus and that, at the time of rendering advice to the complainant, he did in fact have such a complete copy available to him and the complainant.

[46] Annexed to the prospectus was the "Sale of Business Agreement" that was entered into between Sharemax and the developer Capicol. This agreement states that Sharemax will advance an unsecured loan to Capicol and will pay 3% "agent's commission" to an entity called Brandberg. The prospectus made it clear that investors' funds will be paid out of the attorney's trust account to Sharemax who will then pay the funds to Capicol and Brandberg.

[47] One can thus assume that the respondent read and understood these documents at the time he recommended the Zambezi investment to his client, the complainant. No reasonably competent FSP will recommend such a risky investment to a client who had no tolerance for risk and who was incapable of replacing any lost investments.

The De Lange Judgment

[48] The respondent refers to the *De Lange* judgment in support of a submission that this Office made findings about property syndication schemes, such as Sharemax, which is contrary to the views expressed by a High Court judge.

[49] The respondent and his attorney then state that the High Court holds divergent views to this Office regarding risk relating to property syndication companies. To support this startling statement, the respondent refers to a judgment in the case of *Anne-Marie de Lange and others vs Zephan (Pty) Ltd and others*[7]. This judgment certainly does not support the respondent's submission and the judgment is in fact against him. This was a class action brought by investors who lost their funds in a property syndication which was marketed as Picvest. The respondent and his attorney quote from the judgment to make the submission that bonds and buy-back agreements render this investment risk free. The learned judge said no such thing, and the attorney quotes the Judge out of context. The full quotation is as follows:

"The plaintiffs [investors] purchased the shares because of the security of the buy-back agreements. That made the investment <u>ostensibly</u> risk-free. The investors were made to believe that contracts in that form had in fact been signed. It is highly probable that such contracts had in fact been entered into, at least orally," (my emphasis)

The respondent's attorney only quoted the first two sentences. The Judge was not suggesting that buy-back schemes and bonds made the investment risk free. The judge was stating how investors were lured into making an investment in Picvest in the understanding that a buy-back contract was signed. In this case, the investors brought an application for summary judgment where the plaintiffs enforced the terms of the buy-back agreement. The defendants unsuccessfully defended the application on the basis that the buy-back agreement was of no force and effect. Judgment was granted in favour of the plaintiffs against the masterminds behind the scheme.

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7 Case number 82322/14, High Court (Gauteng Division)

Risk Disclosure

[50] The respondent submits that there was adequate disclosure of risk in the prospectus in order to inform the complainant. In support of this submission, the respondent refers to other determinations made by this Office where it was pointed out that the Sharemax application form and disclosure documents state that investors' capital is at risk and the promised income is not guaranteed. The point being made is that this Office is aware that the risks are made known to the investor. Thus, the respondent attempts to avoid the allegation that he did not make a full disclosure of the risks to his client.

[51] The respondent also disagrees that this Office characterizes the Sharemax scheme as "*high risk investment"*. The respondent seems to have forgotten that one of the experts engaged by his own attorney, Mike Schussler, described the investment as very high risk where one should not invest more than 5% to 20% of one's available funds.

[52] The respondent further disagrees that the Sharemax syndication was "*extremely high risk".* To support this submission, the respondent refers to the views of "respected property experts" as well as a document compiled by Old Mutual which state that "investment in property outperformed other sectors over the last ten years". The respondent is deliberately misleading. He can provide no respected expert opinion that states that the Sharemax syndication was a sound and viable business model. An investment in Sharemax debentures did not amount to an investment in property, as contemplated in the Old Mutual report.

[53] However, the test here is whether or not the respondent provided the complainant with adequate and appropriate advice wherein the considerable risks in the syndication product was explained to her. For this, the respondent can only refer to the Sharemax prospectus, disclosure documents and application form. There is no independent record of advice which shows that the respondent made a full disclosure to the

complainant, so that the latter can make an informed decision. It is not adequate for the respondent to rely on the prospectus, as there are contradictions in it that had to be explained to a prospective investor. For instance, the prospectus informs that investor funds will be held in an attorney's trust account. Yet the same prospectus also informs that investor funds will be paid to Sharemax to use the funds to make unsecured loans to a developer. The complainant certainly did not have the capacity to read and understand the contradictions within the prospectus; she relied on her FSP, the respondent.

[54] On a balance of probabilities and on the peculiar facts of this case, it is unlikely that the complainant would have agreed to invest if this was disclosed to her. The complainant repeatedly pointed out that she was "scared" to invest in Sharemax, and only did so because of the reassurances made by the respondent that the money was safe.

[55] The respondent submits that he responsibly advised the complainant to invest in Sharemax, as she needed higher monthly returns coupled with capital growth. Yet on a reading of the prospectus it does not guarantee the promised income and describes the investment as "*capital risk".* The respondent failed to reconcile this with the complainant's needs and financial risk profile.

[56] In this regard I refer to what Harms J stated in the *C S Makelaar* decision:

"Each property syndication scheme must be assessed on its own merits and demerits and with reference to the risk profile of the client. Terms such as low, moderate and high are relative and should be gauged in the circumstances of the case. It is the duty of the FSP to inform the client of inherent risks in the particular product. The client may be prepared to accept the risk which many are, who are looking for a higher return and the possibility of special growth." (My emphasis)

Apart from his continued reference to the prospectus, the respondent cannot provide any evidence that he discharged his duty to inform the complainant of the inherent

risks in Sharemax. There is no record of the respondent explaining the risks to the complainant in plain language in order to avoid uncertainty or confusion, as contemplated in sections 3 and 7 of the Code.

[57] In his response, the respondent quotes copiously from the prospectus all those paragraphs and sections which suggest that this was a risky investment, as the model contemplates that investor funds will be used to fund an as yet undeveloped property and that Sharemax had no independent source of income from which to fund the development. The prospectus does in fact explain this, but it does not do so in plain language easily understood by a lay person. The respondent submits that the complainant must have read and understood these paragraphs in the prospectus, therefore understood the risks but nevertheless wished to invest. This is not the test. What the respondent fails to explain is that he, as a responsible FSP, explained these paragraphs to his client and satisfied himself that she was placed in a position to make an informed choice. Apart from the complainant's signature on the application forms and disclosure documents, the respondent can produce no independent record of advice that the risks were explained in plain language.

[58] Significantly, whilst the respondent presents copious quotations from the prospectus, he did not explain how he understood the prospectus. Nowhere does he state, for example, that he understood from the prospectus that Sharemax intended to use investor funds to pay for the development as well as monthly interest due to the very same investors.

Bias

[59] The respondent, through his attorney, has again accused this Office of bias and holding a subjective view against all FSPs who recommended the Sharemax product. This is a baseless allegation not supported by any evidence. I do not intend to deal with this any further as it does not warrant serious consideration. Besides, this very allegation

was repeated before the former Board and no finding of bias was made against this Office. The respondent is best advised to deal with the merits of the complaint rather than engage in fruitless attacks on this Office. I will at all times deal with parties to a dispute fairly and will exercise an open and independent mind.

[60] The respondent further makes a vexatious allegation that this Office is not independent and comes under the influence of the FSCA. The baseless suggestion is made that the regulator was at fault in the whole Sharemax debacle and influences this Office to avoid making any findings against them. I therefore dismiss this submission as having no substance.

The Success of Sharemax

[61] The respondent submits that he relied on the fact that Sharemax was successful over a lengthy period and many successful syndications were completed. The respondent states that "the Sharemax model worked time and time again and there was no reason to suspect that things would be different with the newest prospectuses concerning the Villa and Zambezi".

[62] The problem with this statement is that it fails to point out that the previous syndications were different to Zambezi and the Villa. As Harms J correctly pointed out, in a passage from the *C S Makelaar* case quoted above, Zambezi and Villa were different in that whilst the other syndications involved acquisition of existing developed properties already earning an income, Zambezi and The Villa had no development and no independent source of income. This difference, notwithstanding the *C S Makelaar* judgment, somehow escaped the attention of the respondent. One can assume that he did not explain this difference to his client; something he was obliged to do as a licensed FSP.

Criticism of this Offices Findings

[63] In his supplementary response, in particular paragraphs 43 to 57, the respondent criticizes this Office's analysis of the Sharemax model. I do not intend to respond to these criticisms, save to point out that the former Board found no fault with it in its judgment in the *C S Makelaar* matter[8]. This Office therefore stands by its analysis of the Sharemax Zambezi scheme.

[64] There is a significant and unexplained contradiction in the respondent's own version. He concedes that his client's principal objective was to earn a higher monthly interest and to have capital growth as a hedge against inflation. He then states that the complainant, after reading the prospectus, understood that neither the income nor capital was guaranteed by Sharemax. Nevertheless, she decided she wants this investment. This is implausible and it is not supported by any independent record of advice that the respondent explained the investment model in plain language and that the complainant was satisfied that notwithstanding the high risk, the investment was suitable for her needs.

The Experts

[65] The respondent's attorney insists on relying on the expert opinions of Swanepoel, Schussler and Cohen. In other determinations, (I refer to the *Maria Catherina Van Wyk* decision referred to above), all three experts were found to be unhelpful. Swanepoel was roundly discredited and in addition he was never an independent expert as he was at some point engaged in promoting Sharemax.

[66] This Office never saw an opinion signed by Schussler and Cohen. What was presented is no more than a hearsay account of what they allegedly said to the respondent's attorney. Despite repeatedly pointing this out, the respondent's attorney refuses to

[8] See paragraphs 31 - 41

provide a signed opinion by these experts. It is therefore questionable whether such opinions actually exist.

[67] Nevertheless, I have seriously considered what the respondent states regarding these "opinions". Cohen is not persuasive as he does not specifically deal with the Sharemax scheme, nor does he state that the idea of using investor funds to pay their own interest and to fund a nonexistent development is acceptable within the investment industry. Cohen merely deals with other hypothetical examples irrelevant to the issues here.

[68] As for Schussler, he certainly does not specifically deal with the Sharemax model and business plan. He does not support the respondent in stating that property syndication of this type is regarded as high risk; not justifying an investment of more than 5% to 20% of one's available funds.

G. FINDINGS

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

69.1 The respondent, in providing financial advice, failed to provide his client with information that was factually correct.

69.2 He failed to provide information about the product that was adequate and appropriate.

69.3 The respondent failed to provide full and frank disclosure of information complainant required to enable her to make an informed decision.

69.4 He failed to ensure that his client invested in a product that was appropriate for her needs and consistent with her tolerance for risk; and

69.5 The respondent failed to take reasonable steps to ensure that the complainant understood the advice and was in a position to make an informed decision.

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

[71] I also find that the respondent, in contravening the Code, committed breach of his contract with the complainant. On this basis alone, the respondent must be held liable for the consequences of such breach.

H. CAUSATION

[72] On the respondent's own version, factual causation was established. But for his advice, the complainant would not have invested in Sharemax and her capital would not have been lost.

[73] As for legal causation, this too has been established and, in this regard, I refer to my determination *in ACS Financial Management vs Coetzee*[9].

[74] I also refer to the Tribunal's decision in *J G Financial Service Assurance Brokers (Pty) Ltd and another vs Robert Prigge*[10].

The Consequences

[75] As explained above, the complainant stopped receiving any further payments after the respondent stopped paying her when Sharemax failed. The respondent submits that the complainant suffered no loss as there is a prospect, post a section 311 scheme of arrangement, that she will receive her investment. Reference is made to the fact that the Zambezi Mall has now been let. The respondent is deliberately vague about this. The "mall" is certainly not operating as a sound commercial enterprise. It is nothing close to the modern shopping mall Sharemax promised its investors. The building as it

9 FAIS-00943-10/11 GP 1

10 FAB 8/2016

stands today can best be described as dilapidated with serious access problems which compromise a flow of customers. It is also mostly empty.

[76] The debentures underwritten by Nova have so far proved to be worthless. Since Nova was appointed to manage Sharemax's assets, no interest payments were made to the complainant. Sharemax has been finally liquidated. There is absolutely no prospect that complainant will recover any of her funds from them.

[77] The respondent must be held liable to pay to the complainant the amount of R650 000.

I. THE ORDER

[78] In the premises, I make the following order:

1. The complaint is upheld.

2. The respondent is ordered to pay the complainant an amount of R650 000.

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

4. The complainant is to cede her rights in respect of any further claims to the investment to the respondent.

DATED AT PRETORIA THIS THE 14TH DAY OF AUGUST 2018.

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NARESH S TULSIE
OMBUD FOR FINANCIAL SERVICES PROVIDERS