

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

CASE NUMBER: FAIS 03238/11-12/ FS 1

In the matter between:

CAROLINA FRANCINA MEYER

Complainant

and

WESTDENE BROKERS CC

First Respondent

WILHELMUS GERHARDUS GERMISHUYS

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT, (ACT 37 OF 2002), (the Act)**

A. INTRODUCTION

[1] Complainant, on advice of respondent, her financial advisor, invested in Sharemax Investments (Pty) Ltd (Sharemax). Upon being alerted to the negative media coverage about Sharemax, complainant unsuccessfully sought the aid of respondent to disinvest from the Scheme.

[2] Complainant claims that were it not for respondent's repeated assurance that the syndication scheme was safe, she would never have made the investment. For reasons that follow, I am satisfied that the Respondents have failed to comply with the Sections 2, and 8 (1) (a), (b) and (c) of Part VII of the General Code of Conduct, (the Code).

B. THE PARTIES

[3] Complainant is Carolina Francina Meyer, an adult female pensioner, residing at 14 Schutte Street, Parys, Free State Province.

[4] First respondent is Westdene Brokers CC, a close corporation duly registered in terms of the laws of South Africa, with its principal place of business at 96 Emmett Street, Vryheid, KwaZulu-Natal province. First Respondent is an authorised financial services provider in terms of the Financial Advisory and Intermediary Services Act (FAIS Act), with license number 14914. The licence was issued on 20 October 2004 and is still in force.

[5] Second Respondent is Wilhelmus Franciscus Gerhardus Germishuys, an adult male member and key individual of first respondent in terms of the FAIS Act. At all material times, complainant dealt with second respondent.

[6] I refer to first and second respondents as respondent. Where appropriate I specify.

[7] In terms of the license respondent was only authorised to render financial services in terms of category 1.8, which relates to the rendering of advice and intermediary services in terms of securities and instruments, shares, from 6 August 2009. Furthermore, despite having applied therefore, respondent is to date still not

authorised to provide advice and/or an intermediary service in terms of debentures and in accordance with licence category 1.10.

C. FACTUAL BACKGROUND

- [8] On or about 03 April 2009, on the advice of respondent, complainant invested an amount of R 300 000.00 (three hundred thousand rand) into a Sharemax property syndication scheme known as The Villa Retail Park Holdings Limited (The Villa) registration number 2008/017207/06.
- [9] To this end, complainant signed an *Application Form for Linked Units*, in which she applied for allocation of units in the The Villa. Attached to the application form was Sharemax '*Investment risk Assessment On Product Information*' which was signed by both the complainant and second respondent. I deal with this later in this determination.
- [10] Complainant made a deposit in the amount of R 300 000.00 in the trust account of Weavind and Weavind Inc, the designated attorneys for the Sharemax syndication. As a result, on 03 April 2009, complainant received an ordinary share certificate reflecting ownership of 300 (three hundred) fully paid ordinary shares of R0.0001 each and an unsecured floating rate claim with a value of R999,99 per share in the capital of the company.
- [11] Having effected the investment, complainant received interest on the investment until 01 October 2010 when interest payments suddenly ceased. Complainant claims it is at this stage that she discovered that The Villa had become bankrupt.

[12] Confronted with this gloomy reality, complainant desperately attempted to get an indication of the way forward from respondent to no avail.

D. THE COMPLAINT

[13] From the foregoing factual background, the crux of the complainant's complaint as captured in the *Complaint Registration Form*, in part, reads:

"...Mr W. Germishuys invested our pension money into Sharemax and assured us that it was not a high risk investment and that our money was save [sic]...We contacted Mr Germishuys, he said he would look into the matter. Up to date we have not received any satisfactory information concerning our investment from Mr Germishuys...Since October 2010 he made appointments to come and see us, to see if he could get our money out of SHAREMAX But never keeps his appointments [sic] always has excuses."

E. RELIEF SOUGHT

[14] Complainant seeks payment of the amount she invested on the advice of respondent in the amount of R 300 000.00.

F. FIRST RESPONDENT'S VERSION

[15] In compliance with Rule 6(b) of the Rules of Proceedings of the Office of the Ombud (Rules), on 29 August 2011, this Office directed the complaint to respondent in which respondent was advised that he had a period of 6 (six) weeks to resolve the complaint with respondent, independent of the Office's intervention.

[16] The 6 (six) week period expired on 11 October 2011.

[17] Following the expiry of the 6 (six) week period, a telephonic conversation between the Office and respondent was had during which respondent requested additional time to consult complainant and resolve the complaint without the Office's intervention.

[18] On 01 July 2011 it became apparent that nothing became of the alleged "talks" between complainant and respondent. The Office then requested a response from respondent addressing the complainant's allegations that she was not properly advised and that the financial product recommended was not suitable for her financial circumstances.

[19] The correspondence also brought to the attention of respondent, the provisions of Rule 6(b) of the Rules. Further that if the complaint remained unresolved by 04 July 2011, the provisions of Section 27(4)(a) of the FAIS Act would then apply.

[20] No response was received from respondent and thus on 08 September 2012 and again on 11 June 2015, the office issued a notice in terms of section 27(4) (c) to respondent.

[21] Respondent was again invited on 12 May 2016 to furnish his response by no later than 20 May 2016.

[22] True to character, Respondent has been every bit as evasive with this Office as complainant alleges he has been with her; despite avowals to the contrary, no such response was ever received by the Office.

G. DETERMINATION

[23] The issues for determination are:

- 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 mandates?
- 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?

[24] On the whole, complainant's complaint is that respondent inappropriately advised her to invest in Sharemax the Villa, without disclosing the high risk nature of the investment and without conducting due diligence on the entities involved. As a result of respondent's advice, complainant made the investment. Following the cessation of complainant's interest payments, complainant is of the view that she has lost her investment.

H. LEGISLATIVE FRAMEWORK

[25] It is appropriate at this stage to sketch out the applicable provisions of the FAIS Act and the Code which are relevant in the present matter.

[26] *Section 1 of the FAIS Act defines 'complaint' as:*

- “ *‘complaint’ means, subject to section 26(1)(a)(iii), a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative -*
- (a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;*
 - (b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage;*
or
 - (c) has treated the complainant unfairly. ”*

26.1 In short (i) there must be a ‘specific’ complaint (ii) relating to a financial service (iii) rendered to the complainant (iv) by a provider or representative (as defined) and (v) after commencement of the FAIS Act and (vi) the complaint must allege that the conduct complained of falls under any one of paragraphs (a) to (c) of the definition.

26.2 This Office is satisfied that the complaint before it meets the requirement of a complaint in terms of the FAIS Act.

[27] 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.'

I. GENERAL CODE OF CONDUCT

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

“(20) 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.”

[29] 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....”

J. ABSENCE OF RESPONDENT’S VERSION

[30] It is abundantly clear that this Office did everything in its power, to obtain respondents’ version. In that regard, respondent were afforded ample opportunity to give their response to the complaint.

[31] As for the Sharemax tool used to assess complainant’s risk profile, there is simply no basis upon which one could take this seriously. Firstly, there is no relevant information relating to complainant’s circumstances whatsoever. How respondent was able to appreciate complainant’s capacity for risk escapes me. The risk profile assessment form does not comply with Section 8(1) (c) of the Code.

[32] 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 the respondent that the Sharemax investment was suitable to complainant’s circumstances. See in this regard section 8 (1) (a) to (c) of the Code.

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

[34] 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**¹ is instructive.

[35] 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."

¹ 1972 (3) 858 (A), at 869 B-E

[36] 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?

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

[38] 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) At the time of making this investment, complainant was 62 years old and had retired from her job of assistant department manager in the children's department of Edgars.
- (ii) Her only other investment experience was with a fixed deposit account with Investec.
- (iii) The funds used to invest in Sharemax emanated from her provident fund payout, and represented her entire life savings.
- (iv) When complainant sought the advice of respondent, she was looking for a vehicle that would provide her with an annuity during her retirement and for the rest of her life.

- (v) As such complainant could not afford to lose this investment. This information was always available to respondent and was necessary for him to take into account in advising complainant as required by section 8 (1) (a), (b) and (c) of the General Code.
- (vi) There is no evidence that respondent had conducted due diligence on the Sharemax investment.
- (vii) There is further no evidence that respondent was aware of the risks involved in Sharemax. These include the lack of apparent safe guards to protect investors against director misconduct; the lack of visible governance arrangements, including the complicated investment structure of the property syndication scheme itself, the lack of transparency and the bases upon which the underlying properties are valued.
- (viii) There is no evidence that respondent had taken the steps to disclose to complainant that he had not carried out due diligence on the investment.
- (ix) Thus, when respondent recommended the high risk investment in Sharemax, he could not have been acting in complainant's interest.

[39] All that respondent had to do was to follow the Code. Had he done so, no investment would have been made into Sharemax. I am satisfied that respondent's conduct caused complainant's loss.

[40] I am further satisfied that respondent was not required to foresee the exact nature of the harm that subsequently ensued, in terms of the Sharemax collapse. That respondent could not understand the investment, had never seen a set of audited financial statements for the group and had no clue of how the entities within the group were managed was sufficient. Respondent chose to ignore these warning signs thereby causing complainant loss.

K. FINDINGS

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

- 41.1. I accept complainant's uncontroverted version.
- 41.2. Respondent advised the complainant to invest R 300 000 in Sharemax the Villa without first assessing the financial needs of the complainant; 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.
- 41.3. Respondent has failed to render financial service honestly, fairly with due skill, care and diligence and in the interest of complainant and integrity of the financial services industry thereby contravening Section 2 of Part II of the General Code of Conduct.
- 41.4. Respondent failed to maintain his records of advice as required by section 9 of the Code.
- 41.5. Complainant's loss was caused by respondent's advice, which was in violation of the General Code.

L. QUANTUM

[42] Complainant invested an amount of R 300 000.00 in The Villa.

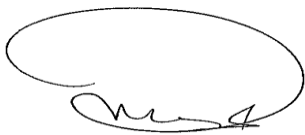
[43] Accordingly, an order will be made that the Respondent pay to the complainant an amount of R 300 000.00 plus interest.

M. THE ORDER

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

1. The complaint is upheld;
2. The Respondents are ordered to pay the complainant, jointly and severally, the one paying the other to absolved, the amount of R 300 000.00;
3. Interest on the amount of R 300 000.00 at the rate of 10.25 % per annum a date seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 30th DAY OF MAY 2016.



**NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS**