

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

**PRETORIA**

**CASE NUMBER: FAIS – 01028-11/12 WC 1**

**FAIS – 09719-10/11 WC 1**

**In the matter between:**

**DANIEL HENDRIK PELSER**

**First Complainant**

**ALTHEA ESTHER PELSER**

**Second Complainant**

**and**

**JOHAN STANDER FINANSIËLE ADVIES DIENSTE**

**t/a JOHAN STANDER BROKERS**

**Respondent**

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

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**A. INTRODUCTION**

- [1] On 16 March 2011, the complainant filed complaints with this Office against the respondent. The complaints arose from failed investments made by the complainant, on the respondent’s advice, into Zambezi Retail Park Holdings Limited (Zambezi), and The Villa Retail Park Holdings Limited 6 (The Villa) syndication schemes promoted by [Call 0800 111 509 to anonymously report incidences of fraud at the FAIS Ombud](#)

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Sharemax Investment (Pty) Ltd (Sharemax). At the time of the advice, the complainants were retired. The complainants each invested R450 000 (Four hundred and fifty thousand Rand).

## **B. THE PARTIES**

[2] The complainants are Daniel Hendrik Pelser, an adult male, and Anthea Esther Pelser, an adult female, whose full and further details are on file with the Office.

[3] The respondent is Johan Stander Finansiële Advies Dienste trading as Johan Stander Brokers with business address of No.1 Lofty Nel Street, Voorbaai, Mosselbay. The regulator's records confirm the respondent's FSP license (No 11984) was approved on 02 August 2004 and its current status reflects as lapsed.

## **C. THE COMPLAINT**

[4] The available information indicates that the complainants contacted the respondent during July/August 2008 for investment advice. This is confirmed by the respondent in that there had been at least three (3) consultations with the complainants between the period August to November 2008. The initial meetings were with the first complainant and the respondent subsequently also met with the second complainant on 26 November 2008. The respondent provided the complainants with an investment proposal which included a recommendation on an investment in PIC.

[5] On 26 November 2008, the second complainant transferred the amount of R450 000 (four hundred and fifty thousand rand) as investment into Zambezi. On 20 May 2009 the first complainant transferred the amount of R450 000 (four hundred and fifty thousand rand)

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as investment into The Villa. It is common cause that the complainants for a period received payment of interest on the investments where after payments stopped.

[6] The complainant is now claiming repayment of the capital amount of their investments.

#### **D. THE RESPONDENT'S REPLY**

[7] This complaint was referred to the respondent on 22 March 2011, in terms of Rule 6 (b) of the Rules on Proceedings ("the Rules") to resolve same with the complainants. The complaint was not resolved and the respondent, through his attorney, submitted his initial response on 10 May 2011. There was further correspondence entered into between this Office and the respondent with supplementary submissions made by the respondent on 08 April 2016 and 08 February 2019 respectively.

[8] The respondent is of the view that he complied with his obligations as financial service provider (FSP), including the General Code of Conduct for Authorised Financial Services Providers and Representatives ("the Code"). Further, in his opinion, the complainants not only considered the respondent's submission regarding the Sharemax investment but had also conducted their own research on the said investment and that at all times the complainants had understood the nature of the investment and the associated risks. Thus, the respondent was of the view that he cannot be held liable for the financial loss.

#### ***Points in limine***

[9] Having established a seemingly hostile and aggressive stance against this Office, the respondent challenged the Office on the following issues:

- Constitutionality and fairness of the process

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- Bias
- The Act and the Code

Each of the above grounds were raised before the Tribunal in an appeal<sup>1</sup>. Accordingly, we point out that on a reading of the said determination, there appears a complete answer to the allegations made by the respondent.

[10] The concerns raised by the respondent in para 11 supra were thoroughly vented and traversed in the *Deeb Risk* judgement and *Siegrist* judgement. In particular, see *J G Financial Service Assurance Brokers v R L Prigge*<sup>2</sup>. For the sake of brevity, the contents of said judgements will not be repeated save to say that all of the grounds raised by the respondent that the process in this Office is unfair were baseless and dismissed. Further, that the submissions made by the respondent is a clear abuse of process that cannot be sanctioned and tolerated, see *Koch and Kruger Brokers CC and others vs D S Van Rooyen*<sup>3</sup>.

## E. INVESTIGATION

[11] The complainants were pensioners and the funds utilised for investment were from existing investments which did not perform as expected by the complainant. According to the respondent, the Client Advice Record was discussed in detail with the complainant and the necessary forms signed. No evidence was submitted indicating that the respondent determined whether the investment into the Sharemax syndications were appropriate to

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<sup>1</sup> Deeb Risk v Oldacre

<sup>2</sup> Case no FAB 8/2016, judgement of Harms J paragraphs 26 to 33.

<sup>3</sup> Case no FAB 40/2018

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the needs and circumstances of complainants. (Note: Sections 8 (1) (a - c) of the Code apply in that all relevant and available information must be considered in ensuring that a recommendation is made that is appropriate to the risk profile and financial needs and circumstances of the client, in this instance the complainants.

[12] Furthermore, Section 8 (1) (d) of the Code requires that where one financial product is replaced by another financial product that the consequences and implications of the replacement are explained to the client in detail and that a record is maintained of the disclosures made. There is no documentation showing that the respondent had complied with this provision of the Code, which would have seen the complainants having been made aware of the risks involved in the recommended property syndication investments. This in turn would have allowed the complaints to have made an informed decision with regards to the appropriateness of the recommendation to their needs and circumstances, and informed decision that is also provided for in Section 7(1)(a) of the Code.

[13] In his response the respondent is of the view that:

13.1 He fully complied with his obligations as an FSP including the Code.

13.2 The complainant was advised of and understood the nature of the investment; the associated risk accompanied with the investment and returns in the context of their financial position and circumstances.

13.3 The structure of the investment was fully set out in the relevant prospectus.

13.4 The complainant conducted research on and familiarised himself with the investment.

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13.5 The complainant, by signing the relevant documents, confirmed the risks involved in investing in Zambezi.

[14] As per the complaint, the complainant requested a product which would provide reasonable monthly pension income, with capital preservation of their investment. The respondent avers that he attended a number of seminars presented by Sharemax and that he is “*au fait*” with its projects. Furthermore, Sharemax had an established track record and the respondent stated that he had no reason to doubt that this project would also be successful.

[15] Apart from his reference to the prospectus, and reference to the research done by the complainants themselves, the respondent failed to provide any evidence that he discharged his duty to inform the complainant of the inherent risks in the Sharemax syndications. There is no record of the respondent explaining the risks to the complainants in plain language in order to avoid uncertainty or confusion, as contemplated in sections 3<sup>4</sup> and 7 of the Code. In his own words “*There were from time to time opinions expressed against the Sharemax model periodically in the Press but these were balanced out by other opinions by other pundits.*”<sup>5</sup>. This statement serves as no guarantee and comfort to prospective clients of the respondent.

[16] On a proper reading of the prospectuses it is clear that the Zambezi syndication for example, was unlike other Sharemax products. Whilst the other investments involved the

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<sup>4</sup> Section 3(1)(a)(i) of the Code “*representations made and information provided to a client by the provider 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*”;

<sup>5</sup> Para 24 of respondent’s Response dated 10 May 2011

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acquisition of existing income generating properties, Zambezi did not own any property, nor was there any income. The respondent provided no evidence that he explained to the complainant this fundamental difference between the other Sharemax products and Zambezi. Furthermore, there is no evidence confirming the respondent in fact comprehended the difference between the said products.

[17] The respondent states that he might face financial ruin<sup>6</sup> should he be ordered to pay damages in this instance. According to respondent he has Professional Indemnity Insurance of R10 000 000 (ten million rand) per annum and should he be ordered to repay the investment of the complainant, and other similar investors, the insurance cover would not be sufficient.

[18] The respondent expected the complainants to read through and comprehend the content of the prospectuses, a highly technical document. (Note: What the respondent fails to appreciate is that he, as a licensed FSP, had a duty in terms of the Code to explain these paragraphs to his clients, in this case the complainants, and to then satisfy himself that they were placed in a position to make an informed decision.). 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.

[19] The respondent opines that *"I submit that no decision can be made concerning any compensation claimed by Mrs Pelser from me before it is determined that Zambezi will fail,*

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<sup>6</sup> Para 47 of respondent's response dated 10 May 2011

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*and if so, to what extent. If Mrs Pelser suffered no financial loss or prejudice she has no claim against me.*<sup>7</sup> This statement by the respondent was premature as it is a fact that Zambezi has now failed. A section 311 scheme of compromise was made however, this did not yield results.

[20] There is absolutely no prospect that either of the complainants will recover any of their funds.

## **F. FINDING**

[21] The ineluctable conclusion to be drawn, based on the undisputed facts of this matter, is that the respondent failed to act in accordance with the Code specifically the sections detailed above. Furthermore, 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.

[22] The respondent failed to satisfy this Office that he complied with this section of the Code in addition to having been unable submit evidence in support of why this investment was deemed to have been appropriate to the needs of the complainant and that he provided advice to the complainant as envisaged in the Code.

[23] The respondent must be held liable to pay to the complainants each the amount of R450 000.

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<sup>7</sup> Para 29 of respondent's Response dated 10 March 2011

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## G. CAUSATION

- [24] The respondent made reference to the KwaZulu-Natal Pietermaritzburg Division High Court judgment in the matter of *Shane Alan Symons N.O. and Another v The Rob Roy Investments CC*<sup>8</sup>, which in his view supports his stance that Sharemax did not fail as a result of any of the risks mentioned in the prospectus, or arising out of the structure of the investment, but rather as a result of the intervention of the South African Reserve Bank (SARB). Thus, the elements of causation were not fulfilled.
- [25] However, the Symons matter is not on all fours with this (Pelser) matter. This Office relies in the judgment handed down in the High Court, Free State Division in the *Oosthuizen v Castro*<sup>9</sup> matter. It is my view that there is no merit in this submission regarding the intervention of the SARB. I am not required to comment about the merits of any claim the respondent may have against the Regulators.
- [26] On the respondent's own version, factual causation was established. But for his advice, the complainants would not have invested in Sharemax and their capital would not have been lost.
- [27] As for legal causation, this too has been established and, in this regard, I refer to my determination in *ACS Financial Management vs Coetzee*<sup>10</sup>.

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<sup>8</sup> Case 4827/2013

<sup>9</sup> Case 2858/2012

<sup>10</sup> FAIS-00943-10/11 GP 1

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[28] I also refer to the Tribunal's decision in *J G Financial Service Assurance Brokers (Pty) Ltd and another vs Robert Prigge*<sup>11</sup>.

## H. THE ORDER

[29] In the result, I make the following order:

1. The complaint is upheld.
2. The respondent is ordered to pay the first complainant R450 000 (four hundred and fifty thousand Rand).
3. The respondent is ordered to pay the second complainant R450 000 (four hundred and fifty thousand Rand)
4. Interest on this amount at a rate of 10,25% per annum from the date of determination to date of final payment.
5. The complainants are to cede their rights in respect of any further claims to these investments to the respondent.

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

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<sup>11</sup> FAB 8/2016

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**DATED AT PRETORIA ON THIS THE 19<sup>th</sup> DAY OF JULY 2019.**



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**NARESH S TULSIE**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**

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