

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS – 02252-12/13 WC 1

In the matter between:

CHERYL ANN PHILLIPS

Complainant

and

SEED BENEFIT CONSULTING CC

First Respondent

LIDIA DA SILVA DERRICA NUNES

Second Respondent

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

A. INTRODUCTION

[1] During January 2012, the complainant approached this Office for assistance. The complainant averred that she invested with Sharemax, on advice of the respondent. The complainant has not received income on the investment, and despite attempts to resolve the matter with the respondent and have the capital withdrawn, she has not been successful.

[2] The complainant invested R200 000 (Two hundred thousand Rand) in the property syndication scheme, and fears that the capital is now lost.

B. THE PARTIES

[3] The complainant is Cheryl Ann Phillips, an adult female whose full details are on file with the Office.

[4] The first respondent is Seed Benefit Consulting cc, registration number 1986/007272/23, a private company duly incorporated in terms of the company laws of South Africa. The regulator's records confirm the first respondent's principal place of business as 17 Kiaat Crescent, Loevenstein, Bellville. The first respondent's FSP license (No 11131) was approved on 08 February 2005.

[5] The second respondent is Lidia Da Silva Derrica Nunes, an adult female representative of the first respondent. At all material times the second respondent rendered financial services to the complainant.

[6] I refer to the respondents collectively as "respondent".

C. THE COMPLAINT

[7] On 18 June 2012, the complainant filed a complaint with this Office against the respondent. The complaint arose from a failed investment made by the complainant, on the second respondent's advice, into The Villa Retail Park Holdings Limited 12, a syndication scheme promoted by Sharemax Investment (Pty) Ltd (Sharemax). At the time of the advice, the complainant was still employed and required an investment to suit her needs when she retired. The money, R400 000 (four hundred thousand Rand) utilized for the investment, stem from the proceeds of a Money Market investment.

[8] The available information indicates that the complainant contacted the respondent during 2009 for investment advice. The respondent provided the complainant with an investment proposal at a meeting on 01 September 2009. The complainant had a Money Market investment which was close to its maturity date. The investment allegedly yielded little growth on capital, and the complainant was looking for alternative investment options.

[9] The Investment Proposal reflected 4 investment options being:

Voluntary Investment – Balanced Portfolio

Property Investment – Louis Group Hotel Debentures
Property Investment – Sharemax Investments – Retail Centre
Money Market - Contingency Fund

[10] Owing to the interest that investment in property syndications was providing at the time, the respondent and complainant decided that the complainant invest in both Sharemax (The Villa) and Louis Group Hotel Debentures. The investments were in the amount of R200 000 (Two hundred thousand) each. The complainant was advised that with the Sharemax investment, she would receive an income of 12.5% from the date of investment until the occupation date. The Louis Group Hotel Debentures is not commented on, as the complaint is against Sharemax. Save to say that the complainant later advised that this investment was also not performing as promised.

[11] The complainant stated that she approached the respondent as she intended to move her capital into a sound investment so as to enable her to have an income after retirement. The complainant started hearing rumours about Sharemax and contacted the respondent for assurance on the investment. According to the complainant the respondent assured her that the press articles were overstated as she had been dealing with Sharemax for years and all was in order. However, the complainant advised that she has now lost her investment of R200 000 set up by the respondent with Sharemax. The complainant is now claiming repayment of the capital amount of their investment.

D. THE RESPONDENT'S REPLY

[12] This complaint was referred to the respondent on 05 July 2012, in terms of Rule 6 (b) of the Rules on Proceedings ("the Rules") to resolve same with the complainant. The complaint was not resolved and the respondent, through her attorney, submitted her response on 16 August 2012. There was further correspondence entered into between

this Office and respondent, with the respondent submitting a supplementary response on 04 August 2015.

[13] The respondent is of the view that she complied with her obligations as financial service provider (FSP), including the General Code of Conduct for Authorised Financial Services Providers and Representatives (“the Code”). Further, in her opinion the complainant at all times understood the nature of the investment and the associated risks thus she cannot be held liable for the financial loss.

Points in limine

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

- Jurisdiction
- Constitutionality and fairness of the process
- Bias
- The Act and the Code

Each of the above grounds were raised before the Tribunal in an appeal¹. Accordingly, we point out that on a reading of the said determination, there appears a complete answer to the allegations made by the respondent.

[15] The concerns raised by the respondent in para 14 supra was 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*². 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), were dismissed. Further, that the submissions made by the respondent is a clear abuse of

¹ Deeb Risk v Oldacre

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

process that cannot be sanctioned and tolerated, see *Koch and Kruger Brokers CC and others vs D S Van Rooyen*³.

E. INVESTIGATION

[16] The complainant was still employed when investing in The Villa and the funds utilised for investment were from an existing investment which did not perform as expected by the complainant. The respondent is of the view that her submission evidences that due process was followed by her and the investment into The Villa was appropriate for the needs and circumstances of complainant. Sections 8 (1) (a), (b) and (d) of the Code apply, in that all relevant and available information must be considered in determining the appropriateness of an investment.

[17] In her response the respondent is of the view that:

17.1 She fully complied with her obligations as a FSP including the Code.

17.2 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.

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

17.4 The complainant, by signing the relevant documents, confirmed the risks involved in investing in The Villa.

[18] Of significance is the fact that the complainant at time of investing in The Villa, was 62 years of age. Further that at point of sale, when completing the Lifestyle Questionnaire, the complainant indicated that she required capital growth for retirement provision. She further stated that as for experience in investing in the financial markets, she relies solely on what her financial advisor recommends.

³ Case no FAB 40/2018

[19] Apart from her reference to the investment proposal⁴ and the Sharemax Investments Risk Assessment, the respondent failed to provide any evidence that she discharged her duty to inform the complainant of the inherent risks in The Villa. Except for the complainant's signature at the end of the said proposal, a 21-page document, and at page 44 of the Risk Assessment, 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 3⁵ and 7 of the General Code of Conduct (the Code). With reference to the said signatures, the respondent can produce no independent record of advice that the risks were explained to the complainant in plain language. In respondent's own words "*The prospectus also fully explains the nature and scope of the investment to an investor, highlights the potential risks, deals with the issue of commission and liquidity of the investment*"⁶. This point is reiterated in her supplementary response⁷. This statement serves as no guarantee and comfort to clients or prospective clients of the respondent.

[20] The respondent claimed to have conducted her own due diligence exercise on Sharemax prior to recommending investing therein⁸. In providing financial advice, it is not enough for a financial service provider (FSP) to merely hand over to a client a copy of the prospectus or Investment Proposal. As provided for in section 8⁹ of the Code the FSP must satisfy herself that she understands the prospectus, and in particular

⁴ Annexure C to respondent's declaration 16 August 2012

⁵ 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*";

⁶ Para 17 of respondent's response dated 16 August 2012

⁷ Para 15 of respondent's Supplementary Response dated 04 August 2015

⁸ Para 25 of respondent's response dated 16 August 2012 and para 33 of Supplementary Response 04 August 2015

⁹ 8(1) A provider other than a direct marketer, must, prior to providing a client with advice-

- (a) take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;
- (b) conduct an analysis, for purposes of the advice, based on the information obtained;
- (c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement; and...

understands the structure of the investment and the risks involved therein. Once the FSP understands this, it is then her duty to explain this to her client.

[21] The respondent stated that Sharemax had a valid FSB license and various prospectuses issued by Sharemax were approved and registered by CIPRO. Also, for a number of years investors received their promised income from Sharemax. Further, the respondent relied on the prospectus as a record of advice.

[22] On a proper reading of the prospectus it is clear that The Villa is unlike other Sharemax products. Whilst the other investments involved the acquisition of existing income generating properties, The Villa did not own any property, nor was there any income. The respondent provided no evidence whether she explained to the complainant this fundamental difference between the other Sharemax products and The Villa.

[23] The respondent states that she might face financial ruin¹⁰ should she be ordered to pay damages in this instance. According to respondent she and other FSPs working in her business has Professional Indemnity Insurance of R5 000 000 (five million rand) per annum and should she be ordered to repay the investment of the complainant, and other similar investors, the insurance cover would not be sufficient.

[24] The respondent opines that "*It is not even clear whether Sharemax has failed or not in the sense of investors losing the capital of their investments*¹¹." This statement by the respondent was premature as it is a fact that The Villa has now failed. A section 311 scheme of compromise was made, however, this did not yield results. There is absolutely no prospect that complainant will recover any of her funds.

¹⁰ Para 47 of respondent's response 16 August 2012

¹¹ Para 62 of respondent's response 16 August 2012

F. FINDING

[25] 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. 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. The respondent failed to submit evidence in support of why this investment was deemed to have been appropriate to the needs of the complainant and that she provided advice to the complainant as envisaged in the Code. The respondent must be held liable to pay to the complainant the amount of R200 000.

G. CAUSATION

[26] On the respondent's own version, factual causation was established. But for her advice, the complainant would not have invested in Sharemax and her 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*¹².

[28] I also refer to the Tribunal's decision in *J G Financial Service Assurance Brokers (Pty) Ltd and another vs Robert Prigge*¹³.

H. THE ORDER

[29] In the result, 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 R200 000 (Two hundred thousand Rand).

¹² FAIS-00943-10/11 GP 1

¹³ FAB 8/2016

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.

[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

DATED AT PRETORIA ON THIS THE 10th DAY OF JUNE 2019.



NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS