

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 07250/11-12/ KZN 1

In the matter between:-

NIRMALA SINGH

Complainant

and

MAK INVESTMENTS AND ASSURANCE

BROKERS CC t/a NU-ERA INSURANCE

BROKERS

First Respondent

ANESH MAHARAJ

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')**

A. INTRODUCTION

[1] On 3 February 2012, Mrs Nirmala Singh (*"the Complainant"*) filed a complaint with this Office against Nu-Era Insurance Brokers and one of its key individuals, namely, Anesh Maharaj, (Anesh). The complaint arises from three investments that were made by the Complainant into various public property syndication investments that were promoted by Sharemax Investment (Pty) Ltd (*"hereinafter referred to as Sharemax"*), on the advice of Anesh.

[2] In summary, the complaint is that:

- 2.1. The risk associated with investing in property syndication was not disclosed to the Complainant;
- 2.2. The Complainant was advised that *“the investment[s] were low risk with very high returns”*;
- 2.3. The Complainant was not provided with *“a comparison of other investments options”*;
- 2.4. Respondents *“insisted”* that the Complainant invests in Sharemax;
- 2.5. Respondents did not disclose their commission earned from investing the Complainant’s capital in Sharemax; and
- 2.6. Respondents *“took advantage of the situation”* in that the Complainant, having recently undergone a surgical procedure, *“was not in a good frame of mind to make rational decisions”*.

[3] The Complainant seeks return of her capital totalling R900,000. 00, in respect of all three investments.

[4] Separate complaints were lodged by the Complainant’s two children Ms R. Singh and Mr T. Singh (under different reference numbers) relating to their own investments that they each had made.

[5] The case being considered here is confined to the complaint under reference number FAIS 07250-11/12 KZN 1 regarding the investments made by the Complainant only and not those made by her children. The complaints of her children are the subject of separate ruling.

B. THE PARTIES

[6] The Complainant, Mrs Nirmala Singh, is 55 years old; her details are on file in this office. She describes herself as a pensioner.

[7] First respondent is Mak Investments and Assurance Brokers CC, a close corporation duly incorporated in terms of South African laws, with its principal place of business situated at 103 Shannon Drive Reservoir Hills, Durban. First respondent is authorised as a financial services provider with license number 10036. The license was issued on 15 June 2005 and is still valid.

[8] Second respondent is Anesh Maharaj, an adult male representative of second respondent whose address is the same as that of first respondent. Second respondent is noted in the regulator's records as a key individual of first respondent along with Mukesh Maharaj and Pranesh Maharaj. No complaint however has been levelled against Mukesh and Pranesh Maharaj.

[9] It would appear from respondents' license that at the time of recommending these investments, respondents were not authorised to render financial services in respect of unlisted shares and debentures. I will return to this issue later in this determination.

[10] The Complainant lists:

10.1. First respondent (referring to it by the name Nu- Era Insurance Brokers) as the person against whom she is complaining. Nu- Era Insurance Brokers appears to be the trade name of first respondent. Respondents

themselves use stationery styled Nu-Era whilst the license is held by first respondent.; and

10.2. Anesh Maharaj, the person who rendered the financial service at the time.

[11] The documents provided to the Office reveal that Anesh Maharaj was the person whom the Complainant primarily dealt with. However the compliance documents, namely, records of advice, client declaration and risk analyser are signed by Mukesh Maharaj. Exactly how this arose is not explained by the respondents in their submission.

[12] The word respondent and respondents should be read to mean both respondents. Where necessary, I specify.

C. THE COMPLAINANT'S VERSION

The Complainant's version is set out as follows:

[13] The Complainant was introduced to Anesh Maharaj by the Complainant's late husband. The Complainant's late husband and Anesh Maharaj were family relatives. The Complainant was first approached by Anesh Maharaj in June 2007, soon after the Complainant's husband passed away, to invest a portion of the proceeds from the Complainant's husband's estate in Sharemax Liberty Mall Holdings Limited ("Sharemax Liberty Mall"). He advised the Complainant that *"Sharemax Investments were safe and offered a much higher return than any other investments available"*.

- [14] He provided the Complainant with “*an investment prospectus*” and “*insisted that [the Complainant] proceed with the investment*”. He did not provide the Complainant “*with any other options to consider*”, he “*strongly recommended that Sharemax was the way to invest*” and he “*did not go into any detail about the risk associated investing (sic) with Sharemax*”.
- [15] Based on Anesh’s advice, the Complainant invested a lump sum of R500 000,00 into the Sharemax Liberty Mall (“*the Liberty Mall Holdings investment*”).
- [16] The Complainant was again approached by Anesh Maharaj (in August 2007) with another Sharemax prospectus, this time for the Bay Estate Development Fund Ltd (“*the Bay Estate investment*”). He again “*reiterated the high returns that the investment offers and proposed that [the Complainant] invest a further R200 000,00*”. Following this “*recommendation*” the Complainant agreed to invest R200 000,00 into the Bay Estate Development.
- [17] The Complainant was again approached, for the third time, by Anesh Maharaj (in April 2008) with another Sharemax prospectus, this time, for the Platinum One Development Fund Ltd (“*the Platinum One investment*”). Again, he was “*very convincing and persuaded [the Complainant] to invest a further R200 000,00*” into the Platinum One Development.
- [18] The Complainant’s total investment in Sharemax therefore amounted to R900 000,00. The origin of the funds invested in Sharemax was the proceeds of the Complainant’s late husband’s estate (in particular the assurance cover he had on his life). These funds were initially invested in Fixed Deposits with a

bank. However, Anesh Maharaj convinced [the Complainant] that the returns in Bank's fixed deposits were very low and that Sharemax was a very good alternative to significantly increase returns. However, he never explained the potential risk associated with investing in property syndication.

[19] When the Liberty Mall Holdings investment was made in 2007, the Complainant received monthly interest payments for her investment but thereafter, from around 2008, the payments significantly reduced and *"kept on tapering down, coinciding with Global recession"*. When the Complainant noticed this, she contacted Anesh Maharaj who responded by *"advising that there may be some reasonable explanation for the decrease in payments and he committed to investigate the matter on the Complainant's behalf"*.

[20] No *"concrete feedback"* was however provided. The more the Complainant *"proceeded to follow up with him, the more he simple (sic) started to avoid [the Complainant's] calls"*. Calls were made in November 2009, January 2010, March 2010, July 2010 and October 2010. The Complainant persisted by continuously contacting Anesh Maharaj to the point where he *"prematurely disinvested an Old Mutual Endowment policy, to the value of R400 000.00, which had an estimated maturity value of R550 000.00. These funds were paid out in November 2010"*.

[21] It must be stated however that there is no complaint before this office regarding the consequences of the cancellation of the Old Mutual investment.

[22] After that the Complainant did not hear from respondent. The only other communication that took place was when respondent informed the Complainant

about a Sharemax Shareholders' meeting at the beginning of 2011. Calls were again made in January 2011, March 2011 and June 2011.

[23] Since then, the Complainant has had to access her remaining capital invested in bank deposits to sustain her living as the payments received from Sharemax were *"not even close to being sufficient"* to cover monthly expenses.

[24] The Complainant states that she placed a lot of reliance on Anesh Maharaj to assist her in making important decisions and relied on the advice provided to her to make the correct investment decisions. He never emphasised that there was a risk associated with property syndication and he did not disclose all the material facts associated with these types of investments nor did he offer any alternatives.

[25] Furthermore, the Complainant states that:

25.1. The Complainant's risk profile was determined as a *"moderate investor"* but that respondents never brought to her attention that investing in Sharemax was *"classified as high risk"* and that the *"capital is not guaranteed"*.

25.2. At the stage of making the Platinum One investment, there was no attempt by respondents to re-establish the Complainant's risk profile or to understand what the Complainant's financial needs were. She may have signed a declaration (declining a full financial needs analysis), says she, but that, according to her, does not constitute her understanding thereof of all interactions that were done with the respondents.

25.3. The respondents simply *“kept on suggesting that investing more funds into Sharemax was a good financial decision”*. She relied *“unconditionally on the expertise and experience”* of the respondents to *“guide us through this process of understanding the danger and risk associated with investing in Sharemax”*. The associated risks were never carefully examined and properly discussed.

25.4. Although the Complainant primarily dealt with Anesh Maharaj, on receipt of the Client Advice Records, the Complainant noticed that Mukesh Maharaj completed the documentation around discussions about the investments despite not being present during the discussions.

25.5. The information populated on the Client Advice Record states that Sharemax pays the respondents' commission. However, on the Sharemax application form it states that *“10% of the capital value will be paid back to the respondent who initiated the business as commission payment and to cover other costs”*. This was not explained by the respondents.

[26] The Complainant accordingly feels that the respondents have not acted in an honest and fair manner and seeks a finding from the Office that the respondents repay the full sum of R900 000,00. On filing the complaint with the Office, the Complainant agreed to abandon the amount of R100 000,00 (that is the amount in excess of R800 000,00 threshold of the Office's jurisdiction). The Complainant therefore claims repayment in the sum of R800 000,00. The abandonment of the amount of R100 000 was a mistake on the part of the complainant. I deal with this later in this determination.

D. THE RESPONDENTS VERSION

(i) Background history with Sharemax and Due Diligence

- [27] The respondents provide a background of their history with Sharemax and the due diligence steps they have undertaken as follows.
- [28] Since 2000, Sharemax advisors called on the respondents to do business with them. The respondents however declined since Sharemax was at the time a new investment company. The respondents only placed an investment with Sharemax for the first time on 11 May 2007. At that stage, Sharemax had been trading for 8 years and had *“successfully promoted 35 property syndication projects”*. By May 2007, *“Sharemax had disposed of 18 such projects giving clients interest on their investments as well as a return of their capital with profit”*.
- [29] The respondents ensured that Sharemax was registered as fit and proper by checking the FSB website on a regular basis. Authorisation was issued to the promoter, in terms of section 8 of the FAIS Act, 2002, on 13 September 2005 as an FSP, under licence no: 6153.
- [30] For each investment the respondents sold, a copy of the prospectus was registered by the Registrar of Companies in terms of section 155 of the Companies Act, together with written consent of all concerned parties and approval of the holding companies was verified according to CIPRO.

[31] The respondents investigated Sharemax with their “*fellow FSP’s*” and “*established that [Sharemax] clients were always paid their income timeously. In addition, Sharemax had an excellent track record with previous property syndications and this was reflected in their prospectuses*”.

[32] The Directors of the various Sharemax syndications, as declared in the prospectuses were people of stature who had a good track record with no convictions. The respondents met one of the partners of the attorneys Weavind & Weavind, who assured the respondents that the legal structure of Sharemax and its products were “*in order and very sound*”. All prospectuses were signed off by:

- (i) The appointed bankers of the company, Standard Bank.
- (ii) The attorneys of the company, Weavind & Weavind.
- (iii) Two independent and professional valuers for each project, W.G. Haese & Partners and New World Valuation.
- (iv) The auditors of the company, Act Audit Solutions Inc.
- (v) The Acting registrar of companies & close corporations verifying registration of the holding companies by CIPRO.

[33] The prospectus made mention of various agreements concluded between Sharemax and the developers. “*Due diligence reports for each project were signed off by the abovementioned and the board of directors*”.

[34] Sharemax was a member of PPSA (Public Property Syndication Association of South Africa) which is supported by SAPOA (South African Property Owners Association).

- [35] Sharemax *“always assured [the respondents] that they complied with changes in legislation”*. The respondents were informed at one of the respondents’ exam seminars conducted by *“Mr. Anton Swanepoel who has a master’s degree in the FAIS Act, that there is no company more compliant than Sharemax”*. The respondents were also informed by a memo by *“Advocate Daniel Opperman, who owns The Compliance Company stating that he would have no hesitation in investing his mother’s money with Sharemax”*.
- [36] The respondents state that Sharemax had met all requirements of the FAIS Act and had offices countrywide. The respondents had visited the Sharemax office in Pretoria and met the directors. They also visited some of the shopping malls that were syndicated by Sharemax.
- [37] A registered, colour printed prospectus was discussed and given to all investors prior to entering into any of the investments. The Registrar of companies stipulated that a registered prospectus was required in order to market the Sharemax product. The respondents state that the details that had to appear were included in the documentation and in the respondents’ opinion *“Sharemax complied with all these issues”*.
- [38] The Government Gazette under the Department of Trade and Industry also outlines the requirements of property syndication companies and that *“once more Sharemax complied with all aspects of this document”*.

(ii) Background history with the Complainant

[39] The respondents provide a background of their history with the Complainant as follows.

[40] They have known the Complainant for 25 years and are very closely related to the family. All the Complainant's insurance and investment needs are handled by the respondents.

[41] The family relationship soured about a year ago when the Complainant refused to meet certain obligations with regards to the inheritance of her late husband. The relationship with the respondents (as the Complainant's brokers) was not however affected and the respondents "*kept in constant contact with [the Complainant]*".

[42] The Complainant made a remarkable recovery from her illness and was always in control of her entire assets. The Complainant has various fixed and current assets and the "*investments with Sharemax for herself and her children represent 12.8% of entire portfolio*". The Complainant "*refers to herself as being a pensioner for the sake of sympathy. An individual with as much assets and cash cannot be regarded as a pensioner. She is actually an astute businesswoman*".

(iii) The Respondents' Response

[43] The respondents' response to the complaint is summarised as follows.

[44] The respondents processed all claims for the Complainant's late husband's estate and the proceeds were paid to the Complainant as the beneficiary.

- [45] The Complainant informed the respondents that the money was in a savings account at a very low interest rate and that she was looking for any investment that will provide a regular monthly income.
- [46] The respondents provided the Complainant with a prospectus for Sharemax Liberty Mall and “*explained the type of investment and that there were no guarantees*”. The Liberty Mall Holdings investment was done 6 months after the passing of the Complainant’s husband. “*This gave [the Complainant] adequate time to settle down and [the respondents] in no way took advantage of [the Complainant’s] loss*”.
- [47] The respondents left the Complainant with the prospectus for “*her to make a decision*”. The Complainant then called the respondents “*a week later to confirm that she wanted to invest R500k into the said investment, which she finally did*”. The respondents “*did not in any way insist that she invest in this property syndication, it was entirely her decision*”.
- [48] The respondents “*offered to do an FNA [a Financial Needs Analysis] but [the Complainant] declined this offer*”. The Complainant signed and “*waived her rights*” to the respondents’ offer.
- [49] The Client Advice Record “*confirms her objectives and that she had a fair understanding of the investment*”. The Risk Analyser confirmed that she was of moderate risk profile. The Complainant “*being a businesswoman, had wanted the higher income and she was prepared to take on more risk than would be expected of a moderate risk profile*”.

[50] The Complainant signed and confirmed *“her acceptance and that she understood the risks associated with the product and the absence of guarantees”*. In terms of the Application form (for the Sharemax investment), the Complainant *“received a prospectus prior to completing this application which indicated that she chose an income plan. The last page of the application ... further indicates that she was aware of all the questions asked including the fact that she was offered a guaranteed option and she has acknowledged all the above by way of her signature”*. The documents that were signed *“indicated that [the respondents] would be paid commission by Sharemax”* and that *“Sharemax, as a promoter will retain 10% of the invested amount to pay commission and other costs”*.

[51] The respondents state that the Complainant was *“aware of the fact that [the respondents] earned 6% commission on these investments”*.

[52] As regards the Bay Estate investment, the respondents state that in August 2007 the Complainant indicated to them (at a family visit) that she *“also wanted to invest R200k which was lying in a Nedbank cheque account”*.

[53] The respondents state further that *“[a]t this stage [the Complainant] did not have need for additional income and wanted this amount invested into a growth plan”*. The respondents *“verbally advised her to add this amount to an existing lump sum policy that she inherited from her husband’s estate with Old Mutual, (Pol. No: 14820340) which was rolled over”*.

[54] The Complainant then *“requested other options and at that time Sharemax had the Bay Estate on offer as a growth plan offering a simple interest rate. [The*

respondents] *handed her a prospectus together with a letter from Mr. J.W. Botha headed Chairman's Recommendation*".

[55] *"Based on the information that [the Complainant] had at hand, she opted for the Bay Estate investment"*. The respondents completed the necessary application and statutory documents and the Complainant issued a cheque from a Nedbank account under the name of Estate Late N.H. Singh.

[56] The respondents state that it was not necessary to complete a risk profile form as one was done in June 2007 and that the Complainant's profile had not changed. They offered the Complainant a *"full financial needs analysis which [the Complainant] once again declined by way of her signature"* on the documents.

[57] At this stage the Complainant had received 3 months income from her Liberty Mall Holdings investment and was *"confident to reinvest with Sharemax. Once again she was informed that the interest rate was not guaranteed"*.

[58] As regards the Platinum One investment the respondents state that in March 2008 the Complainant *"enquired about any other investment with Sharemax that was offering a high interest rate, as the rates she was getting from the bank was dropping"*. At this stage the Platinum One Development had become available and the respondents handed the Complainant a copy of the prospectus.

[59] The Complainant then *"indicated that she wanted to invest R200k"* and went to Durban to sign the documents on 29 March 2008.

[60] The Complainant acknowledged the commission by initialling the page on which *“the commission is disclosed at 6%”*. The documents that were signed also state that *“there is an investment risk and that the ultimate decision to invest or disinvest solely rests with the investor. The investor is not obliged to take the advice of the representative”, “... the prospectuses are approved by the Registrar of Companies”* and that *“there is a risk [that both] capital and income [could not materialise] ... the investment is not liquid”*.

[61] The respondents state further that the Complainant was *“aware of the contents of this document and has acknowledged same, by way of her signature thereto”* and that the document verifies that the Sharemax Platinum One investment was compared to the bank deposits and money market funds at the Complainant’s request. There was no change to the Complainant’s risk profile and the Complainant once again declined to have a full Financial Needs Analysis done.

[62] The respondents conclude that:

62.1. Sharemax was placed under statutory management by the South African Reserve Bank and that *“It is rather unfortunate that the ruling by the Governor of the Reserve Bank, has affected some 34 000 investors”*. The ruling also adversely affected the entire financial services industry that marketed these products. The decision of the Reserve Bank should not have been taken.

62.2. *“No reasonable FSP with the best qualifications, experience or product knowledge could have expected that a regulatory risk would materialise more than 10 years later”*. *“The entire financial services*

industry that marketed these products together with their clients became victims of this decision”.

62.3. The Complainant was *“fully aware of the type of investment and the risks associated with such an investment as recorded on the “Record of Advice” under the section “Important information highlighted to Client” and also on the USSA documents”.*

62.4. The Complainant was a moderate investor and the property sector meets the “moderate criteria”. In this instance, the “massive shopping malls would have provided security for this investment” and the Complainant *“being a sophisticated individual and an astute business lady had wanted the higher income and she was prepared to take on more risk than would be expected of a moderate risk profile”.*

62.5. The Complainant understood the risks associated with the product and the absence of guarantees and acknowledged this by *“way of her initials and signatures”* on the documents. The Complainant was made aware of *“the important and relevant sections and paragraphs of the prospectus”* and *“initialled the relevant blocks on the application forms as they were explained”*. A registered prospectus was given for every investment made.

62.6. Mukesh Maharaj was registered and acted as a representative under supervision. The Complainant had no objection to signing the USSA disclosure documents.

- 62.7. The Complainant has not lost any of her capital and the complaint is premature. The statutory managers and the board of directors are safeguarding the investments. The Complainant was notified about the website of Frontier Asset Management so that she could get updated information. Frontier Asset Management sent a 100 page document to all Sharemax investors confirming that the liquidation of the Sharemax investments is prevented.
- 62.8. The respondents have not contravened the definition of “*complaint*” as provided for in the FAIS Act and have acted in the utmost good faith and in the best interest of the Complainant.
- 62.9. When the price of complainant’s *‘Old Mutual shares dropped from R20 to R5’* complainant did not complain to the Ombud, *‘neither did she claim from Old Mutual. The abrupt ending of complainant’s income was due to a regulatory risk based on a decision taken by the Reserve Bank in respect of debentures issued by Sharemax promoted companies, that resulted in Sharemax having to stop paying interest.’*
- 62.10. Respondents further state, *‘this section of the Banks Act has a grey area and such a decision should not have been taken. According to SARS, payment of interest on shareholders loan accounts is legal and an acceptable accounting practice’ (sic).*
- 62.11. Respondents further raise the question *‘how can one State department ruling differ from another, when the act is the same?’*

(iv) The Respondents' Supplementary Response

[63] In amplification to the respondents' initial response, the respondents state that:

63.1. They (as the respondents) have been misled (by Sharemax and the Financial Services Board). The level of deception was not evident at the time and the information was not provided to the respondents.

63.2. The respondents state that the directors and managing director of Sharemax group of Companies had signed personal sureties and declared that they will be held personally liable for any losses due to misrepresentation in the prospectus. In spite of the undertakings, they misled the public.

63.3. They state there was a massive scale of fraud, which dates back to 2008 whereby the inspectors of SARB failed to inform the FSB of certain wrongdoings. It took SARB three years to realise that Sharemax had contravened the Banks Act. In the interim the FSB had renewed Sharemax's FSP licence twice.

63.4. Referring to an article of October 2012 respondents state that Mr Gerry Anderson, Deputy Executive of the FSB, had in March 2007 stated that he was very pleased with the compliance of the Sharemax Group. The fact that individuals in the capacity of Mr Gerry Anderson could endorse and promote the Sharemax Group '*gives us food for thought*', say respondents.

63.5. There is a possibility of them being sued for wrongful information on Sharemax which was discovered and known by the South African Reserve Bank and the Financial Services Board four years ago. This is

a travesty of justice whereby they as Financial Service Providers and the investors are continually prejudiced. The consequence of ruling against the Financial Service Providers will result in closure of their practices.

63.6. The Complainant has not lost any capital as yet. The only possible loss to date is the interest on the income plans. The capital will be reimbursed according to the Asset Management Reports. The Complainant has an abundance of assets and still leads a lavish lifestyle even in the absence of income from Sharemax.

63.7. Respondents further ask whether the Ombud will assist the FSPs against the PI insurers to recoup the investor losses especially when the question of loss has not been established.

63.8. In so far as the issue of establishing the risk profile of their client goes, respondents place on record that, *'The only Risk Profile of any investor is that, they want the best return and highest rate in a Bull market with no risk in a Bear Market. We do not know of anyone who would fall outside of this Risk Profile.'*

E. DETERMINATION

The complaint

[64] Section 1 of the FAIS Act defines a *'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. ”*

[65] 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.

[66] The essence of the complaint filed by the complainant is that respondents failed in their legal duty to appropriately advise her of the risks involved in the Sharemax investments. As a result of such failure, complainant suffered financial damage.

Justiciability

[67] Rule 4(a) provides that a complaint is justiciable if four conditions are met, namely,

67.1. the complaint falls within the ambit of the FAIS Act and the Rules;

- 67.2. the person against whom the complaint lies is subject to the provisions of the FAIS Act;
- 67.3. the conduct complained of occurred at a time when the Rules were in force; and
- 67.4. the person against whom the complaint lies has failed to address the complaint satisfactorily within six weeks.

[68] Based on the foregoing discussion, it can be concluded that there is a justiciable complaint before the Ombud.

Jurisdictional provisions relating to the investigation of this complaint

[69] The complainant being of the view that the respondents had failed to satisfactorily resolve the complaint within the six weeks period provided for in the rules, lodged her complaint with this office.

[70] Following lodgement of the complaint with this office, the respondents were granted until 1 April 2012 to resolve the complaint with the complainant. The complaint not resolved, respondents were notified in terms of section 27 (4) that the office intends to investigate the matter and were accordingly invited to submit their full version together with documents in support thereof.

[71] Following the decision handed down by the Board of Appeals in the matter of Siegriest and Becker determinations (In the consolidated hearing of cases FAIS 00039/11-12/GP1 and FAIS 06661/10-11/WC1) on 10 April 2015, respondents were on 19 June 2015 furnished with a further notice in terms of section 27 (4) of the FAIS Act, (the notice).

[72] The notice invited respondents to provide this office with their full statement of events together with all documents that support their version. It was communicated to the respondents that after receipt of such information, the office would commence its investigation and, that the matter would be determined without further reference to them.

[73] Contained in the notice were the following:-

- i) Property syndications are high risk investments for a number of reasons, let alone the fact that they are structured as unlisted companies; the bases upon which the underlying properties are valued are never fully disclosed.
- ii) Being unlisted means that such an investment should be considered as a capital risk investment. Investors such as complainant are at risk as unlisted shares and debentures are not readily marketable, the value, not readily ascertainable, and should the company fail, this may result in the loss of the investor's entire investment.
- iii) Against this background set out in paragraph 73 respondents were asked to provide evidence, using records compiled at the time, to demonstrate that complainant had been advised of the risks involved in the Sharemax investment;
- iv) Respondents were further invited to provide information which led them to conclude that the Sharemax investment was appropriate to their client's risk profile and financial needs. In this regard, respondents' attention was drawn to the provisions of section 8 and 9 of the General Code.

- v) With the regard to their authority to advise on the Sharemax product, respondents were requested to provide full details in the event they had acted in a representative capacity in rendering financial service to complainant, along with a copy of their license.
- vi) A record that shows that respondents had, prior to advising complainant on the Sharemax investment, elicited personal and financial information from their client in order to appreciate her position.

[74] Respondents' response was due by 3 July 2015.

[75] There is no response from respondents following this notice. Nonetheless, respondents had submitted comprehensive responses in both original and their response in amplification. Respondents were duly informed of the complaint, appreciated the case against them, and afforded adequate time to respond thereto. The notice further confirms to respondents that the office considers them as respondents and the consequences thereof.

Issues for determination

[76] Whether in rendering advice to the complainant, respondents contravened the provisions of the FAIS Act and Code in any way. Specifically, whether respondents had appropriately advised complainant;

[77] In the event respondents are found to have violated the Act and Code, whether such violation caused the loss complained of; and

[78] Quantum of such loss.

***Did respondents breach the Act and Code in advising complainant?
Specifically, did respondents advise complainant of the risk involved in
investing in the Sharemax investments?***

Licence

- [79] Before I analyse respondents' submissions, I consider it appropriate to deal with the issue of respondents' license once and for all.
- [80] Respondents were asked to provide full details of their license to demonstrate that they had the authority to render financial services in connection with unlisted shares and debentures, sub-categories (1.8 and 1.10). A search through the regulator's records indicated that respondents were not licensed to render financial services in relation to this type of investment. Respondents were nevertheless afforded opportunity to address this office on their license.
- [81] There is no dispute that Anesh advised complainant to invest in this investment. Respondents also do not dispute that Mukesh was not present during complainant and Anesh's discussions. Mukesh however, signed the compliance documents.
- [82] The explanation to this bizarre situation is that Mukesh claims to have been a representative of USSA and therefore authorised to render financial services under supervision in connection with this product. In support, a page titled USSA 'Disclosure Document – Annexure A' with the name Mukesh Maharaj was provided to this office. The document amongst other things notes:
' I am rendering financial services under guidance / instruction / supervision of a key individual or other representative until the minimum prescribed level of

expertise has been obtained. The document contains two documents at the bottom, one of which appears to be that of complainant.

[83] In their response to this office, respondents plainly avoided the issue of their licence. They simply dropped the line that Mukesh was a representative of USSA and refrained from making any further statements.

[84] Mukesh had nothing to do with rendering financial services to complainant. Respondents' devious statement that Mukesh rendered financial services to complainant under '*supervision/guidance/instruction of a key individual*', must be rejected.

[85] Not only did Anesh violate the law by advising complainant on the Sharemax investment without the necessary license, he failed to disclose his license status to his client.

Appropriateness of advice

I will deal with the investments according to their date order:

Liberty Mall Investment

[86] The narrative provided by respondents to this office is that complainant had sought their advice on an investment that would pay regular income. They state that complainant was not satisfied with the interest rate offered by the bank at the time.

[87] There is a dispute of fact regarding who approached the other. However, nothing turns on this. Based on respondents' version, upon the enquiry by the

complainant about an investment that could generate better returns, respondents offered complainant the Sharemax Liberty Mall investment, provided an explanation of the investment and mentioned that there were no guarantees before handing complainant the prospectus. Complainant came back after one week and offered to invest R500 000 into Sharemax.

[88] In support of their case, respondents have provided this office with certain compliance documents. These are, Client Declaration of Single Need, Risk Analyser and Client Advice Record. I shall now go through these. All three documents are signed by Mukesh and complainant.

[89] '**Client Declaration Single Need**'. The document opens like this: '*Dear Mrs Singh, We refer to your recent application to Sharemax, Attached please find a copy of the application submitted to Sharemax by us on your behalf. Please go through the copy of the submitted application*'. Then the document goes on to state: '*The foundation of our business is objective and comprehensive private financial planning. At the heart of this process lies a detailed financial analysis of your current financial position, clearly defining your financial goals, and then developing strategies designed to help you move towards these objectives. You have indicated the fact that, at this stage, you would like to invest in an **Interest Bearing Savings with Capital Growth**. (own emphasis). However passionate we are about the process we have to offer, we also recognise the principle of client choice. You have indicated the fact that, at this stage, you would like to invest in an **Interest Bearing Savings with Capital Growth**. Your decision not to go through the process as described above is respected and should not*

be interpreted as a waiver of your rights, either offered voluntarily or solicited by our firm. ' (emphasis mine)

[90] At the outset, this document suggests that respondents, in contravention of section 8 (1) of the General Code, sold the Sharemax investment to complainant, sent the signed application form off to Sharemax and then covered their tracks by asking complainant to sign this document. It is plain from their version that they did not, at any stage prior to selling the Sharemax investment, request appropriate information from complainant, for the purpose of providing advice.

[91] **'Risk analyser'**: This document shows a series of questions and scores. It concludes that complainant is of *'moderate risk.'* There is absolutely nothing in this document which suggests complainant is an astute *'business woman' who was keen to take on more risk'* than her profile suggests. The undeniable truth is that complainant was looking for an interest bearing savings, with capital growth, and accepted respondents' advice that the Sharemax investment would address such need and was suitable to her risk profile. The only rational conclusion to be drawn from this is that respondents recklessly ignored the results of their own risk analysis in pursuit of the sale with no regard to complainant's circumstances. Respondents could not have been acting in their client's interest when they recommended this investment.

[92] **'Client advice record'**. This document notes the complainant's Investment Object as *'To do Investment in the form of a lump sum in order to generate a monthly income at an interest rate that will be higher than the bank and capital*

growth. The client's financial situation is noted as 'Good – has sufficient assets and funds from husband's estate.'

[93] The unsubstantiated conclusion that complainant's financial position is 'Good' must also be rejected. Respondents were invited to demonstrate, using information collected from their client at the time, that the high risk Sharemax product was suitable to complainant's circumstances.

[94] This is respondent's long standing client. Surely they must have collected information from her to demonstrate what complainant's assets and liabilities are, including her income and expenditure.

[95] Respondents have further painted the picture to this office that the investment in Sharemax was insignificant to complainant's total worth but refrained from providing supporting evidence. They do not explain why complainant had to prematurely disinvest from the Old Mutual investment when the Sharemax product failed.

[96] Complainant's current product experience is noted as '*First time investor in this type of investment. Has a fair understanding from explanation given by broker.*'

[97] Under products considered, the following is noted: '*No other products of this kind were considered as we as brokers are not happy with the compliance and structures of other companies. The bank and voluntary annuity rates at present are offering 7.25 as the highest rate with no capital growth.*'

[98] Motivation is set out as follows: 'Higher investment rate of 9.2% escalating at 4% of 9.2% pa plus expected capital growth of 14.8 % after five years.'

[99] These statements demonstrate just how reckless respondents were. The Sharemax product cannot not be compared to a bank product, on the basis of a return. The two are materially different. Respondents must have been aware that to do so would be misleading complainant. This record demonstrates that respondents were not interested in appropriately advising complainant.

[100] Respondents were aware that complainant's capital came from her late husband's life assurance. She and her minor children then aged 15 and 17 were dependent on the same capital. Instead of appropriately advising complainant, to ensure that her reasonable needs of regular monthly income and capital growth were met, they went on to speculate with her capital. In order to entice complainant, they compared the return on Sharemax with that of a fixed deposit and an annuity. In so doing, respondents created the impression that the Sharemax product is akin to a bank or life assurer's product. On this fact alone, respondents' conduct must be condemned. The fact that complainant accepted all this simply means she had no clue what was going on. She relied on the expertise of the respondents to appropriately advise her.

[101] On probabilities, if complainant was the sophisticated business woman she is made out to be by respondents, she would have seen through this. What is known to this office is that complainant's highest qualification is a matric and was selling beauty products at the time of investing in Sharemax.

[102] The record of advice further provides for, important information highlighted to client as follows:

- Income is guaranteed for 1 year only

- *Interest will be 9 % while in Weavind Inc Trust account*
- *There is no capital guarantee ‘as the client holds a percentage share directly in the project’, (viz, Liberty Mall Welkom) (own emphasis)*
- *Should client want to liquidate there will be a 5 % commission if done through Sharemax. Nil commission, if client does this privately;*
- *‘Commission is paid by Sharemax, Client has 100% allocation and Interest growth is calculated on the full invested amount.’ (own emphasis)*

[103] There is no unequivocal statement that complainant was at risk of losing her capital. Simply advising the client that capital is not guaranteed because she has a direct stake in the project did nothing to highlight the extent of the risk involved in Sharemax.

[104] Complainant had no stake in the Liberty Mall. The statement is misleading. The company that owned the Liberty Mall Welkom was a private company, separate from the company to which complainant had lent her funds. This was also not an investment in the property sector, as respondents suggested to this office. The private company that owned Liberty Mall had been lent money by Liberty Mall Holdings Ltd. Complainant’s investment was dependent on the debtor’s (Liberty Mall Holdings Ltd) ability to repay her investment. Such is the complicated structure of property syndication investment, all of which is contained in the prospectus. Respondents themselves did not read the prospectus.

[105] In their response, respondents sought to persuade this office that complainant knew that she paid commission of 6 %. To buttress their argument, they made

reference to the Sharemax application form signed by complainant. Their own record of advice undermines respondents' claims. To argue that the client was advised of the costs citing an application form, in the face of a record of advice that says otherwise is duplicitous. Respondents are simply admitting to misleading the complainant.

[106] The Code¹ enjoins providers to disclose costs in specific monetary terms where such monetary obligation is reasonably pre-determinable. No reason has been advanced by respondents to demonstrate why they could not inform complainant what 10 % of R500 000 means in monetary terms.

[107] The last page of the client advice record contains a section in which complainant acknowledges amongst others that, she had been informed and *'understands the risks / guarantees or the absence thereof associated with the product and or underlying funds selected'*. This is followed by a general comments section in which complainant acknowledges amongst others, that *'all relevant sections of the prospectus was (sic) explained'* and the original prospectus was left with client. Respondents themselves could not understand the prospectus; they are simply being disingenuous in suggesting that complainant understood the Sharemax product.

[108] Before I deal with the remaining investments, I mention that respondents were invited to demonstrate, using records compiled at the time of providing advice, that they had taken into account complainant's circumstances before concluding that the Sharemax investment was suitable to her risk profile. In

¹ Part II, section 3 (1) (a) (vii)

other words, respondents had to demonstrate to this office that they had complied with the peremptory provision 8 (1) of the General Code. The section reads: 'A provider other than a direct marketer, must prior to providing a client with advice take reasonable steps to seek from the client **appropriate** and **available** information regarding:-

[109] *the client's **financial situation, financial product experience** and objectives to enable the provider to provide the client with appropriate advice;*

[110] *conduct an analysis for the purpose of advice, based on the information obtained; and*

[111] *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.'* (emphasis mine)

[112] Respondents have so far, woefully failed to provide the relevant information.

Bay Estate Development Fund Investment

[113] This investment was concluded two months after the first Sharemax investment.

[114] The '**Declaration of Single Need**' refers to and attaches a copy of the application form, which was submitted to Sharemax on behalf of complainant. It invites complainant to read through and ensure that all details are correct. The investment is for R200 000. The document further states:

[115] *'The foundation of our business is objective and comprehensive private financial planning. At the heart of this process lies a detailed financial analysis*

of your current financial position, clearly defining your financial goals, and then developing strategies designed to help you move towards these objectives.....

*You have indicated the fact that, at this stage, you would like to invest in an **Interest Bearing Savings with Capital Growth.....**'(own emphasis)*

[116] In respect of all three investments, respondents claim that they had offered to do an FNA but complainant had waived her right to a Financial Needs Analysis. At the heart of this is an attempt to escape accountability for what was inappropriate advice from the start.

[117] Respondents had a duty to appropriately advise complainant, see section 16 of the FAIS Act. In order to do so, respondents had to carry the steps set out in section 8 (1).

[118] Section 8 (4) (a) provides for instances where the client has not provided all the information requested by a provider, or where, depending on the circumstances of the case, there is not reasonably sufficient time to conduct such analysis. In such cases, the Code mandates providers to fully inform the client and ensure that the client understands that:-

i) the analysis could not be performed; and

ii) there may be limitations on the appropriateness of the advice provided; and

iii) the client should take particular care to consider on its own whether the advice is appropriate.

[119] In all three declarations of single need, respondents on their own version had neither sought information from their client for the purposes of an analysis, nor

did their client fail to provide the information. There is no statement that there was not reasonably sufficient time to conduct an analysis. It explains why respondents did not warn complainant about the limitations in their advice. Respondents cannot now evade their flawed advice by hiding behind these documents.

[120] In their submissions, respondents, despite the specific request, failed to provide evidence of the information they took into account prior to concluding that the Sharemax investment is suitable to their client's circumstances. The reasons are clear, complainant's circumstances were simply not suited to the investment. Their own risk analyser provides the answer.

[121] How respondents were able to conclude that this product, which they hardly understood, was appropriate to respond to complainant's reasonable needs is inexplicable. One thing remains clear; the undisclosed commission of 6 % with no claw back remains an attractive proposition.

Client Advice Record

[122] The specific objective reads: 'To capitalise her money in **a safe property fund** over a short period and at an above average rate.'

[123] The financial situation is noted as, 'Good' while complainant's current product experience is, '*Good, - Has Income funds with Sharemax Existing Investor.*'

[124] Complainant's risk profile is noted as 'Moderate' and the product considered is: 'Sharemax' only.

[125] Motivation is noted as follows: ***'This is a Property Investment Offering 18.5% growth p.a on a simple interest basis. The plan is expected to mature in 3 yrs although the projections are done over 5 yrs, which is the maximum term the client may have to remain in the plan.'*** (own emphasis)

[126] Important information highlighted to client:

'This is the 1st phase of the Property Investment

The Interest rate is not guaranteed

The capital growth is paid as interest

The term is 5 yrs although Sharemax expects to complete in 3yrs (maturity)

Interest will be 0 % while in Weavind and Weavnd Inc Trust A/c.

There is a 5 % commission charge if liquidated and sold by Sharemax – Nil charge by broker;

Commission is paid by Sharemax \$ Client receives Growth on 100 capital.

Client holds share directly in the project.' (own emphasis)

[127] This is further evidence that respondents misled the complainant. Once again, they do not provide any information to support the conclusion regarding complainant's financial position. They further describe the investment as an investment in property, of which it is not.)

[128] Likewise, the '**Client Advice Record**' supporting the Platinum One Fund investment states the following as complainant's objectives: *'To achieve a growth higher than the bank or money market fund in a **safe investment platform.**'*

[129] The version that complainant understood the risks involved in the high risk Sharemax product is not borne out by respondents' own documents. Their reliance on the Sharemax application forms cannot assist respondents. It is plain that respondents told complainant that the Sharemax investments were safe. On that basis, complainant provided the funds from the fixed deposits.

[130] It is further improbable that complainant, with experience only in fixed deposits and endowments would off her own bat, choose Sharemax. She only invested in Sharemax because the risk was not disclosed. She was not advised that she could lose her capital due to the high risk nature of the investment. Incidentally, respondents' records suggest this much.

Causation

[131] I refer to the discussion in Wallace vs CS Makelaars and O, FAIS 07445-10/11 GP1 paragraphs 61 to 63. The question to be answered here is whether but for the respondents' advice the complainant would not have lost his funds; this is an issue of factual causation.

[132] If factual causation was established, could the respondents be expected to reasonably foresee that Sharemax will collapse and was there sufficient nexus between the complainant's loss and the advice given by the respondents; this is an issue of legal causation.

[133] On the respondents' own version factual causation has been established. But for the respondents' advice, complainant would not have invested Sharemax and complainant's capital would not have been lost.

[134] The issue of legal causation based on the question of indeterminate liability for FSPs for pure economic loss has to be addressed (the remoteness question).

[135] I do not believe that the loss of complainant's funds falls under the realm of delictual "pure economic loss". The respondents' conduct resulted in direct loss of the complainant's capital or property. In this regard see :

Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)

[136] *'Pure economic loss' in this context connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses or the diminution in the value of property.'*

Legal Causation

[137] Respondents claim that what had happened here is director misconduct together with what they term '*regulatory risk*'. They claim that regardless of a provider's experience and qualifications, it was not reasonably foreseeable that Sharemax will collapse. Significantly, the respondents failed to deal with the law.

[138] All that respondents had to do was comply with the law. Had the respondents carried out the inquiries suggested in paragraph 107 to 111, above, they would have realised that complainant's circumstances were not suited to this type of investment.

[139] In addition, had respondents carried out the due diligence suggested in section 2 of the Code, they would become aware that:

- i) there were insufficient safeguards against director misconduct or mismanagement;
- ii) the structure of the investment was too complicated and no apparent protection for investors existed;
- iii) they had no information at their disposal that pointed to sound corporate governance practices in the companies involved;
- iv) there was no transparency in the way in which the underlying securities were priced.
- v) there were no credible answers that explained the return promised to investors. In this regard, respondents cannot explain the miracle in Sharemax's business model.

[140] The test here is not whether or not a collapse, for whatever reason, was foreseeable, but whether or not the investment was appropriate for the complainant, bearing in mind her circumstances and tolerance for risk.

[141] The enquiry is whether, as a matter of public and legal policy, it is reasonable, fair and just to impose legal responsibility for the consequences that resulted from the conduct of the respondents in giving advice that was inappropriate in terms of the Act and the Code.

[142] It is easy and convenient to impute the loss to director misrepresentation and the so called '*regulatory risk*'. The complainant's loss was not caused by director misrepresentation and '*regulatory risk*'. If the respondents did their work according to the Act and Code, no investment in Sharemax would have been made, bearing in mind complainant's circumstances. The cause of loss

was the inappropriate advice to invest in the high risk Sharemax product. That the risk actually materialized, for whatever reason, is not the cause of the loss. Otherwise the whole purpose of the Act and Code will be defeated. Every FSP can ignore the Act and Code in advising their clients and hope that the investment does not fail. Then when the risk materializes and loss occurs they can hide behind unforeseeable conduct on the part of product providers. This will fly in the face of public and legal policy and the provisions of the Act and Code will be rendered useless.

[143] The reasonable foreseeability test did not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result; it was sufficient if the general nature of the harm suffered by the complainant and the general manner of the harm occurring was reasonably foreseeable. A skilled and responsible provider, acting according in compliance with the Act and the Code would not have advised complainant to invest in Sharemax. To even suggest that the investment was a 'safe property fund' was reckless. The loss suffered by complainant was as a result of respondents' inappropriate advice and was reasonably foreseeable by the respondents.

Is the complaint premature?

[144] Respondents have also sought to argue that complainant has not lost any money and that her complaint is premature. They argue that the statutory managers and the board of directors are protecting the complainant's investment. They provide no basis for this conclusion.

[145] Respondents made this statement in 2012. The truth is, it is now four years since respondents made this statement and six years since Sharemax collapsed. Complainant has not received a cent from the investment since the collapse. She had to turn to her Old Mutual investment and other remaining funds. In the meantime, the investors who complain to this office have received no credible information as to the steps that are being taken to repay their investments. Most investors see incomplete and ghost buildings all around, with no suggestion that they will ever recover their money. All indicators are that complainant has lost her total investment.

[146] Finally, a brief comment is necessary regarding respondents' claims of due diligence and unforeseen regulatory risk. In what they term, 'due diligence', respondents urged for a finding that what had occurred here is nothing more than '*regulatory risk*', which no advisor could have foreseen, regardless of their qualifications and experience.

[147] Respondents have completely misdirected themselves. There are large numbers of competent financial advisors in this country who clearly saw the high risk nature of the Sharemax offering and steered clear of recommending it to their clients, notwithstanding the attraction of high commissions and projected returns.

[148] Respondents further argue in their due diligence that they were misled by the Sharemax directors. The statements that Sharemax had "*successfully promoted 35 property syndication projects*"....*giving clients interest on their investments as well as a return of their capital with profit*" demonstrates the

reckless approach adopted by respondents in recommending Sharemax to its clients. They simply conveyed statements they had never bothered to verify.

[149] The tragedy in all of this is that respondents were not candid with their client about their understanding of the product. Lured by what appeared to be an attractive return from a distance, not to mention their commissions, respondents simply advised complainant that Sharemax was suitable to her circumstances.

[150] It is apparent from respondents' version that they had no idea just what the investment is about.

[151] Respondents had not once referred to the Sharemax group's audited financial statements. They had no idea of the miracle that paid the attractive returns and commissions promised by the promoters. This, during a difficult economic climate.

[152] Respondents did not once refer to the lease agreements that were supposedly concluded by Sharemax with tenants.

[153] Respondents refer to a Government Gazette under the Department of Trade and Industry and speculatively conclude that Sharemax had complied. Precisely what Sharemax had complied with in the Government Notice 28690, respondents do not say.

F. CONCLUSION AND FINDING

[154] For the reasons aforementioned, respondent had failed in their duty to appropriately advise complainant.

[155] Respondents failed to advise complainant that the Sharemax investment was of high risk and not suitable to her risk capacity and tolerance.

[156] But for respondents' conduct, complainant would not have made an investment in Sharemax.

[157] Respondents' conduct undermined their duties as prescribed in section 2 of the Code.

[158] Respondents' conduct was the sole cause of complainant's loss.

[159] When complainant lodged her claim, she mistakenly applied the jurisdictional limit to the three investments as though it was one investment. As such, each of the three investments represent three distinct and separate causes of action. Thus, complainant is entitled to recover the full amount in respect of each investment.

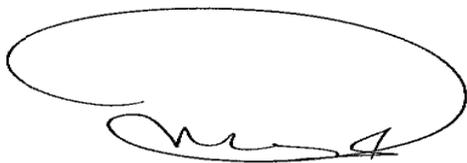
[160] Thus, I intend to award complainant the full R900 000.

G. ORDER

[161] The complaint is upheld;

1. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount R900 000.
2. Interest at the rate of 10.25 % from a date seven days from date of this order.

DATED AT PRETORIA ON THIS THE 4th DAY OF MAY 2016.

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by several smaller, connected letters, all contained within a large, hand-drawn oval.

NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS