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Chapter 12: Trevor's Nel Commission albatross

*"...once the Securities Services Bill (SSB) becomes law, the FSB will have the powers to prohibit a person from carrying on the business of trading in unlisted securities or may impose conditions for the carrying on of such business. Trading in unlisted securities will also be regulated by the Financial Advisory and Intermediary Services Bill once it becomes law soon."***-Financial Services Board press release, 15 August 2002**

*"As you are aware, the FSB does not regulate property syndication promoters, but this falls under the Department of Trade and Industry...The proper application of the FAIS Act is our only concern in this area. If you have evidence that any company is involved in deposit taking activities, please liaise directly with the Registrar of Banks."***-Gerry Anderson, Deputy Chief Executive Officer, Financial Services Board in a letter to the author on 2 March 2007**

The FSB's press release¹ was in direct response to my column published in Finance Week² a day earlier. Understandably, the column's opening line didn't go down well in the Erasmusrand-based headquarters of the FSB:

"The time has arrived for PSCGG's regulator to stand up and be counted so that the SA investment public will know who is supposed to be protecting its interests."

By then Tigon chief executive Gary Porritt had stolen the assets of PSCGG without any regulator in South Africa being aware of it. Very elementary checks would have

¹Press release by Financial Services Board. *FSB says beware of investing in unlisted securities*, 15 August 2002. See annexure 3 for the full press release.

² Basson, Deon. *Will the real PSCGG regulator please stand up?*, Finance Week, 16 August 2002 (the magazine was available on 14 August 2002). www.finweek.co.za See annexure 4 for the full text of the column

revealed at a much earlier stage that PSCGG was in breach of the Companies Act in more than one respect.³ Had a competent inspectorate, attached to either the FSB, the Registrar of Banks or the Registrar of Companies, followed up on such breaches at the outset they could very well have prevented the theft that occurred later-on. The press release followed five years after the FSB, the SA Reserve Bank and the Registrar of Companies had been criticized by the Nel Commission for having conducted insufficient inspections in relation to Masterbond.⁴ Nothing seemed to have changed in the ensuing years. Interestingly, PSCGG wasn't mentioned by name in the press release. The press release endorsed a view expressed by regulators during the Masterbond scandal, that such warnings to the public should be dealt with cautiously because entrepreneurs suffering damages may have believed the registrar of financial institutions to be culpable.⁵

At least the press release offered some 'rocket science' advice to members of the public:

'Rocket science' advice

- Ensure the company is reputable and registered with the Office of the Registrar of Companies (even the telephone number 012-3109791 was provided).
- Ask the company to provide all relevant information on its performance and operations.
- Obtain a copy of the company's prospectus.
- Be aware of being offered spectacular returns (remember, when it is too good to be true, it usually is).⁶

Time moved on and PSCGG went into liquidation in March 2003. The full extent of Porritt's stealing then became public knowledge. Porritt transferred the bulk of the cash PSCGG had raised into private entities controlled by him.⁷ PSCGG operated for more than two years without a prospectus. The company provided no true and relevant

³ See chapter 7

⁴ Nel, Mr Justice H.C. *The first report of the Commission of Inquiry into the affairs of the Masterbond group and investor protection in South Africa*, 1997, vol. 1, pp. 37-42

⁵ See chapter 4

⁶ Press release, op cit

⁷ Basson, Deon. *Cheque mate: Porritt's money moving racket*, Finance Week, 16 April 2003. and *Porritt defiant*, Finance Week, 30 September 2004 www.finweek.co.za

information on its performance and operations, but promised spectacular returns. Despite the critical tone and pertinent advice contained in the Nel Commission report, and the negative publicity it generated, none of the regulators did inspections at an early enough stage to stop the fraudulent operation in its tracks.

The FSB press release explained: "...trading in unlisted securities is not a regulated activity under the Stock Exchanges Control Act, 1985, and currently does not fall within the FSB's ambit."

FSB Financial Markets Senior Manager, Norman Muller was quoted in the infamous press release as saying that, once the Securities Services Bill (SSB) became law, the FSB would have the powers to prohibit a person from carrying on the business of trading in unlisted securities or to impose conditions for the carrying on of such business. My column⁸ highlighted the predicament at the time:

We know PSCGG has been marketing shares without a valid prospectus for more than two years after the validity of the original and only prospectus ended as far back as 15 June 2000. But the prominent advertising campaign should have made the Registrar aware that the marketing of new shares has continued actively after that date.

You could perhaps argue that PSCGG is not a company in the normal sense and is actually meant to be a unit trust scheme. In this case, why is the Financial Services Board (FSB) not the regulator? But whether it is a company or a unit trust scheme, PSCGG simply refuses to disclose its investment portfolio. Whichever of the two PSCGG may be, it is violating either the Companies Act or the Unit Trusts Act.

But there could be a third possibility. That is that its activities as a result of the non-disclosure of its investment portfolio and the selling of investments without a valid prospectus, it could perhaps be seen as a deposit-taking institution. In this case, the Reserve Bank's bank supervision division would be the regulator. But it is very possible that PSCGG is craftily slipping through all three legislative nets – the Companies Act, the Unit Trust Control Act and the Banks Act – and making a fool of all three regulators.

Shortly afterwards, at the end of a seminar on money laundering at the then Rand Afrikaans University, Muller approached me at the watering hole, saying that I had given the FSB a raw deal.

A few weeks later Finance Week editor Rikus Delport noted in his weekly column: "Finance Minister Trevor Manuel last week again stressed the important role of

⁸ Basson, Deon. *Will the real PSCGG regulator please stand up?*, op cit

investigative journalism. At the launch of a panel being set up by the JSE Securities Exchange and the SA Institute of Chartered Accountants to ensure listed companies comply with generally accepted accounting practice, he singled out FW stalwart Deon Basson for his great contribution in this regard.”⁹

In the meantime the PSCGG drama kept on brewing with chairman Jack Milne playing cat and mouse with investors who wished to sell their shares.¹⁰ None of the three regulators could offer a solution even after the arrest of Porritt in December 2002. In the end it was the tax and prosecuting authorities that moved in on Porritt.¹¹ But it was too late to rescue the lost savings of investors. PSCGG was left, hung out and dry and was eventually liquidated in March 2003.¹² Later attempts to persuade the Asset Forfeiture Unit to carry out a raid on Gary Porritt’s assets lead to nothing.¹³

An unrelated event occurred six weeks after the FSB press release. It set the scene for a regulatory nightmare that would last for many years.

First a delegation from Sharemax Investments paid a visit to Jurgen Boyd, at the time head of the Collective Investment Schemes department of the FSB. The meeting took place on 27 September 2002 and as a result thereof Boyd’s office requested Sharemax’s representatives to present a written submission setting out their intended business structure.¹⁴

At that stage Sharemax was a relatively modest operation that had raised R111m from the public through seven

⁹ Delport, Rikus. *Support them*. Finance Week, 13 September 2002 http://www.fin24.com/articles/default/display_article.aspx?Category=Finweek&ArticleId=1518-1445-1902_1775523 retrieved on 21 June 2008

¹⁰ Basson, Deon. *Jack Milne converts to free market*. Finance Week, 4 December 2002 www.finweek.co.za

¹¹ Basson, Deon. *Going, going Tigon*, Finance Week, 13 November 2002; *Tigon’s huge tactical error*, 18 December 2002. www.finweek.co.za Basson, Deon. *Die einde van Tigon*, Sake, 18 Desember 2002; *Kersskok vir PSCGG-beleggers*, 24 Desember 2002; *Die dilemma van PSCGG-beleggers*, 13 Januarie 2003 www.sake24.co.za

¹² Basson, Deon. *PSCGG in voorlopige likwidasie*. Sake, 20 Maart 2003 www.sake24.co.za

¹³ Basson, Deon. *Wat van Gary Porritt se bates?* Sake, 24 Februarie 2004. www.sake24.co.za

¹⁴ Transvaal Provincial Division of the High Court. *Sharemax Investments (Pty) Ltd vs Deon Basson*. Case number 3208/2006. Affidavit by Jurgen Arnold Boyd, 17 February 2006, par. 2.2. Paginated papers. p. 353

property syndications.¹⁵ In all probability marketing for Oxford Gate, the eighth syndication, was in full swing when the meeting took place.¹⁶

Also of interest is the attempt to determine which entity it was that approached the FSB. Was it Sharemax Investments CC or Sharemax Investments (Pty) Ltd? The financial statements of Oxford Gate identify Sharemax Investments CC as the related entity that sold the shares in Double Flash Investments 145 to Oxford Gate for R5,5m. The latter was at that stage a trust and Double Flash a private company with no assets.¹⁷

It appears highly probable that Sharemax Investments CC was indeed the entity that approached the FSB.

In his subsequent letter to the FSB attorney Eckardt le Roux did not indicate which one of the two entities he was representing. I'll return to the relevance of the two entities later.

Le Roux nevertheless illustrated three different scenarios. He was actually seeking advice and comment as to whether the three scenarios fell under the now repealed Unit Trust Control Act or the newly enacted Collective Investment Schemes Control Act.¹⁸

One of the scenarios entailed investors buying trust shares at R1,00 per share and making a loan to the trust of R999,00. Investments were thus made in multiples of R1 000. The trust would then buy the entire shareholding in a private company which owned the immovable property.¹⁹

This option was in fact the structure which had been followed by Sharemax for its first 14 syndications.²⁰

Boyd later recorded in court papers: "My office arrived at the conclusion that all the scenarios mentioned in Le Roux's letter will fall under the ambit of the Unit Trust Control Act and the Collective Investment Schemes

¹⁵ 148 Leeuwpoot Street in Boksburg, Centurion Office Park, Centurion Hazel, Centurion Homefront, Centurion Highveld, Clubview Corner and Tyger Valley Omniplace

¹⁶ The syndication was completed in November 2002. See the financial statements for 2003.

¹⁷ Financial statements, Oxford Gate Property Investment Trust, 2003, p. 17

¹⁸ Case number 3208/2006, op cit, Affidavit by Jurgen Arnold Boyd, 17 February 2006, par. 2.3 and 2.4. Paginated papers. p. 353

¹⁹ Letter by Weavind & Weavind, 1 October 2002, p. 1. Paginated papers, pp. 357-358

²⁰ See chapter 5

Control Act. At the time we were under the impression that (Le Roux's) letter was written with the view to establishing a property syndication scheme in the near future."²¹

From the last sentence it would appear that the Sharemax delegation didn't inform Boyd in any way that they were already raising funds for Oxford Gate and had already completed seven other syndications using the very same proposed trust structure being turned down by Boyd.

Boyd does not reveal in his affidavit whether the FSB did any inspection on Sharemax during the nine months following Le Roux's letter. Had the FSB or any other regulator done a thorough inspection it would certainly have revealed that Sharemax had been using the unlawful trust structure repeatedly since 1999 and had continued to do so after Le Roux's letter had been delivered.

In fact, after Boyd's directive in 2002, and until the scheme was stopped, six further syndications raised R272m from the public using the same unlawful structure.²²

During that nine month period (October 2002 to June 2003) *Rapport's Geld* magazine repeatedly published articles and advertisements about property syndication.²³

The fact that Sharemax was raising money from the public was, as a result of publicity in *Geld-Rapport*, very much public knowledge. Any official of the FSB or any other regulator reading *Rapport* should have been aware of it. It raises the question as to whether following the media is part of the job description of FSB inspectors.

The desirability of the publicity that *Geld-Rapport* had given Sharemax and competitor PIC Syndications is a separate issue and warrants vigorous debate in the media.

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²¹ Boyd's affidavit,, op cit, par. 2.5. Paginated papers, p. 353

²² Glen Gables, Groenkloof Plaza, Riebeeckshof, St Georges Square, Olive Wood and The Bluff

²³ See for example Viljoen, Frans. *Eiendomsbeleggings 'n Uitsoekbelegging vir een en elk. Geld*, - Rapport, 24 April 2003, pp. 56-57

²⁴ See chapter 15 and Basson, Deon. *How free is the press in Southern Africa*. ITI News, 3 September 2007. <http://www.itinews.co.za/news.aspx?categoryid=42&subcategoryid=1217&itemid=648cd9ac-c5c7-494b-b7d5-d083fd7e9be6> retrieved on 28 June 2008 or Basson, Deon. *How free is the media in South Africa?* Auditing SA, Summer 2007/2008, pp. 52-53
<http://www.saiga.co.za/documents/publications/summer%202007/14%20Basson%20How%20free%20is%20the%20media.pdf>

Not until some nine months later, in June 2003, did the FSB received a query from the 'general public' about Sharemax. And only then did it transpire that Sharemax had continued doing business in the format of a trust, without the knowledge (nor consent) of the FSB.²⁵ The structure had been in use since 1999 with the syndication of 148 Leeuwpoot Street in Boksburg²⁶ and, as mentioned earlier, various other properties had been syndicated in the same manner before Le Roux's letter of 1 October 2002.

Consequently, a meeting was convened with Sharemax representatives on 15 July 2003. Here Sharemax was informed about the requirements of the Collective Investment Schemes Control Act.²⁷

Section 50 of the aforementioned Act requires a collective investment scheme in property to list on a licensed exchange. Sharemax then informed Boyd that they would not be able to conform as the size of its business would not support such a listing. According to Boyd this caused Sharemax to investigate alternatives to its business structure as it stood at the time.²⁸

Nevertheless, Sharemax steamed ahead and undertook more syndications using the trust structure, notably The Bluff in Durban.

During that time my meeting with Sharemax took place²⁹ and two columns were published in *Sake*³⁰ highlighting the fact that Sharemax was in all probability also in breach of section 30 of the Companies Act by using the trust structure. It was unlawful to use a trust to raise funds from the public.³¹ The huge margins it earned also came under scrutiny.

Only after this, on 28 September 2003, did Le Roux inform the Financial Services Board that Sharemax wished to "convert" its property investment schemes into public

²⁵ Boyd, op cit, par. 2.6. Paginated papers, p. 354

²⁶ www.sharemax.co.za/properties/leeuwpoort/default.htm retrieved on 8 May 2007

²⁷ Boyd, op cit., par. 2.7. Paginated papers, p. 354

²⁸ Ibid, par. 2.8. Paginated papers, p. 354

²⁹ See chapter 5

³⁰ Basson, Deon. *Sharemax gaan sy ongewone struktuur verander*. Sake, 16 September 2003 en *Beleggers moet dalk sekerheid kry*, 23 September 2003

³¹ See chapter 5 and Companies Act, Act 61 of 1973, section 30

companies.³² The unlawful syndication of The Bluff continued undisturbed.

Finally, on 24 October 2003, the Financial Services Board instructed Sharemax to cease taking money from the public until such time that public companies had registered prospectuses.³³

"...we cannot condone them continuing to transgress the Act" Boyd told Moneyweb. The FSB has also requested Sharemax to stop advertising and marketing its investment scheme until the scheme is properly incorporated in terms of the Companies Act."³⁴

Then the time for regulator-hopping (arbitrage is perhaps the more civilized euphemism) arrived. Complexity arising from multiple regulators set in. The Registrar of Companies became the 'lead regulator' who from then onwards would register dozens of prospectuses.³⁵

However, regulator arbitrage didn't mean that Sharemax was departing the shores of the FSB entirely. The reason for that was the introduction of the Financial Advisory and Intermediary Services Act (FAIS).

FSB Deputy Executive Officer Gerry Anderson summarized the history:"...Masterbond for example, led to the Nel Commission of Inquiry, the commission made certain recommendations and these contributed significantly to the drafting of the FAIS Act."³⁶

There is an element of truth in what Anderson said but the Nel Commission's report also focused strongly on existing legislation that had not been implemented. The Companies Act stands out in Judge Hennie Nel's analysis. The underlying danger was, and still is, that the FAIS Act purports to remedy situations where parties are actually in non-compliance with the Companies Act, or other legislation, not necessarily being administered by the FSB.

³² Ibid, par. 2.9. and letter from Weavind & Weavind to FSB, 28 September 2003. Paginated papers, pp. 354 & 361-362

³³ Ibid, par. 2.9 and letter from FSB to Weavind & Weavind, 24 October 2003. Paginated papers, pp. 354 & 361-362

³⁴ Kemp, Shirley. *FSB clamps down*, 11 November 2003

<http://www.moneyweb.co.za/mw/view/mw/en/page62053?oid=36455&sn=Daily%20news%20detail>
retrieved on 23 June 2008

³⁵ See chapter 13

³⁶ Kok, Leon interviewing Gerry Anderson, Deputy Executive Officer of the FSB. *Good regulation does not guarantee investor security*. FSB Bulletin, First Quarter, 2007, pp. 10-11

Would FAIS root out the ills created by sly entrepreneurs, or was it about to become a bureaucratic monster killing off honest business ventures and financial advisors? Would the real scamsters be stopped in their tracks? Early on the following robust "free market" opposition view was published:

Like UK's FSA our FSB and Fais don't understand markets The Financial Services Board reckons our year-old Financial Advisory and Intermediary Services Act will ensure only "fit and proper" financial advisers, dramatically reduce mis-selling of financial products, and combat policy lapses and surrenders. Registration of financial service advisers began on 15 October. 'Over-regulation can make business unprofitable', but the act is 'a consumer protection measure and will be measured in benefits to the consumer rather than inconvenience to the profession', say the apologists. Britain's Financial Services Authority has been 'a very expensive disaster' and 'it's time for the bureaucratic control freaks to butt out'. It has caused 'huge and irreversible damage with not just direct costs but compliance and the time wasted on digesting its great tomes'. Fais is equally 'documentation intense'. Britain, says one critic, 'does not need an unwieldy control-freak City regulator. All it needs is a better understanding of how market forces work in the interests of the consumer. Bureaucracies don't.' Same here.³⁷

In August 2007 Leon Louw, executive director of the Free Market Foundation, and I did back-to-back presentations at the annual convention of the Compliance Institute. I sat next to him and listened to the presentation of the FSB's FAIS department.

I've known Louw since 1985 when he was involved in initiatives to create a free market haven in the Ciskei. Along with Martin Welz, current editor of Noseweek, I was investigating corruption in the Ciskei.³⁸ During that time I got to know Louw fairly well.

I've always enjoyed his to-the-point and out-of-the box approach to public issues. Being trained in law his analytical mind, blended with creativity, is in many ways unique and extremely entertaining. I don't think he's radical, although I'm not in total agreement with his *laizes faire* approach. A market can only be free if there are level playing fields with fair and equal access to information for all parties.

³⁷ Harris, Dr Jim. *Free Market Foundation – Regulation Updates*. November 2003

³⁸ Welz, Martin & Basson, Deon. *Ciskei en SA bots oor geldsake*. Sake-Rapport, 24 Februarie 1985, p. 1; Welz Martin en Basson, Deon. *Geheime stryd in Ciskei*. Rapport, 24 Februarie 1985, p. 1; Basson, Deon. *Vryemarkstigting lyk na Who's Who*. Sake-Rapport, 7 April 1985, p. 8 etc

However, that afternoon at the Compliance Institute we were both astonished by the bureaucratic nature of the FAIS legislation and the cumbersome subsidiary legislation. "And then they couldn't stop the Fidentia disaster in good time" Louw said to me (I'll return to Fidentia later).

We agreed that a much simpler and principled rule-of-law-type approach would have been much more appropriate and effective. My one-line interpretation of Judge Nel's report is exactly that.

What South Africa actually needs is a value driven approach as opposed to a rule based approach. I highlighted a pertinent example in chapter 7. Company law has over many decades successfully cultivated the *value* of the *doctrine of disclosure*. It is embodied in the South African Companies Act, and in many others internationally. If you discard established *values* like this then you're more or less compelled to compensate by creating a bureaucratic monster and following a strict rule-based approach.

Nevertheless, I'm not saying the FAIS legislation is useless. There are some very useful parts, such as the focus on training and on disclosures as required by section 19 of the Act.

One of the key features of the FAIS legislation is the list of so-called "fit and proper" requirements for financial services providers.³⁹ The principled nature of the section in the regulations dealing with honesty and integrity resembles a value orientated approach.

The remainder of the regulations appear to be very detailed but the prescriptive nature of certain parts of it is likely to turn into an administrative nightmare for the FSB and financial services providers. And it is unlikely to root out the real scamsters.

Sharemax is a case in point. Since November 2003 they have nestled in with the Registrar of Companies as "their" regulator who has in turn allowed several material and unlawful non-disclosures.⁴⁰

³⁹ Government Gazette No 29132, 16 August 2006. *Determination of fit and proper requirements for financial services providers, 2006.*

⁴⁰ See chapters 7 and 13

Sharemax Investments (Pty) Ltd got its license as a financial services provider on 13 September 2005.⁴¹ It took rather a long time to get the license, as the FAIS Act came into operation on 1 October 2004.⁴² I don't know whether a postponement or an exemption was granted by the FSB in the interim.

What I do know is that Sharemax continued to raise funds through prospectuses for about two years before the FSP license was finally granted. During that period a further R948m was raised⁴³ without the public being afforded any protection from the FSP licensing process whatsoever. By the time it got the license it had already raised R1,3bn by slipping through holes in regulatory nets.

It is to be hoped that Boyd disclosed this history since 2002, in detail, to his colleague Gerry Anderson, who runs the FAIS department.

As stated earlier, Boyd's department in all likelihood engaged with Sharemax Investments CC in 2003. Anderson's department got a FAIS application from Sharemax Investments (Pty) Ltd at some stage between October 2004 and September 2005. Did the two FSB executives notice that the latter was not the same entity as the one Boyd had dealt with historically and did they ask questions about what happened to Sharemax Investments CC?

For completeness of the history lesson, Sharemax Investments CC first changed name to WSA Property Investments CC and then went into voluntary liquidation.⁴⁴ According to a Cipro search the name change occurred on 2 April 2005 and the voluntary liquidation on 14 September 2005. Co-incidentally or not, this was a day after Sharemax Investments (Pty) Ltd was granted its license as a financial services provider.

Strangely, to this day there is still no reference number for Sharemax Investments CC at the insolvency

⁴¹ Financial Services Board license number 6153, 13 September 2005

<http://www.sharemax.co.za/Portals/0/docs/FSP%206153.pdf> retrieved on 22 June 2008

⁴² Press Release of the Ministry of Finance, 20 September 2004

⁴³ Atterbury Décor, Comaro Crossing, Montana Crossing, Davenport Square, Northpark Mall, Midway Mews, The Village, Witbank Highveld, Tarentaal, Magalieskruin and Flora Centre

⁴⁴ Basson, Deon. *Liquidated Sharemax entity earned millions*, 13 April 2008.

<http://www.deonbasson.co.za/Portals/0/BLOG%205.1.pdf> Retrieved on 21 June 2008

department of the Master of the High Court. Unfortunately the news of the liquidation only reached the public domain in June 2006⁴⁵ and should have been under scrutiny when the license application was considered. Nevertheless it smacks of an attempt to bury the CC's controversial history of routine material non-disclosures and secret profits.

Sharemax Investments (Pty) Ltd MD Willie Botha, former director Stephan Schoeman and marketing director André Brand were all members of Sharemax Investments CC.⁴⁶

But, by the time the license was considered, much information was already in the public domain about Willie Botha's involvement as a member of DW Promotion CC. DW Promotion played a similar role to Sharemax with the promotion of the so-called Oude Molen companies, where the public suffered major losses.⁴⁷ Although he was not a director of the syndication companies, he signed off various prospectuses and he was a member of the promotion entity DW Promotion. He can hardly claim that he didn't know what was going on.⁴⁸

Although no names of companies were mentioned by Prof. Tanya Woker in her investigative report into property syndications,⁴⁹ the failure of the Oude Molen scheme must have been at the back of her mind when she signed it off.

Prof. Woker is chairperson of the Consumer Affairs Committee, law professor at the University of Kwazulu-Natal and a member of the Consumer Advisory Panel to the FSB.⁵¹

It is noteworthy that the Consumer Affairs Committee is attached to the Department of Trade and Industry. So is the Registrar of Companies. The FSB, an independent statutory body, reports to the Ministry of Finance. The

⁴⁵ Basson, Deon. *Why I discarded my Moneyweb Blog*, 13 April 2008
<http://www.deonbasson.co.za/Blog/tabid/54/EntryID/5/Default.aspx> retrieved on 22 June 2008

⁴⁶ Cipro search

⁴⁷ See chapter 4

⁴⁸ Ibid

⁴⁹ Woker, Prof. Tanya. *Consumer affairs committee. Report in terms of section 10 (1) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No 71 of 1988). Report no. 121. An investigation into property syndication schemes*. Government Gazette no. 28496, 10 February 2006, pp. 4-13 .

⁵¹ <http://www.ukzn.ac.za/law/staff/tw.html>

Registrar of Banks, which is a department of the SA Reserve Bank, ultimately also reports to the Ministry of Finance.

This split regulatory control, highlighted during the PSCGG debacle, would have an impact on Sharemax too.

Our gallery of regulators ⁵²

Instrument	Reserve Bank	FSB	JSE	Consumer Affairs Committee	Registrar of Companies
Banking deposits	X	X			
Listed shares		X	X		X
Unlisted shares		X		X	X
Unlisted debentures	X	X		X	X
Insurance policies		X			
Collective Investments		X			
Pyramid schemes	X	X		X	

Judge Nel's report of 1997 noted:

"Fragmentation of supervision not only means divided responsibilities, but also restricted access to information and the resultant 'grey' areas where no supervision by the Registrar of Banks or the FSB and its predecessor had taken place, led to inadequate supervision of the Masterbond, Owen Wiggins and Supreme groups of companies with resultant losses to investors." ⁵³

Back to Woker's report. Although it was signed by her about a month before Sharemax got its FSP license, it was only published six months later. ⁵⁴ Anderson contributed to the report. ⁵⁵ Nevertheless, the question may justifiably be asked whether his colleague Jurgen Boyd testified before

⁵² Basson, Deon. *Will the real PSCGG regulator please stand up*, op cit

⁵³ Nel, Judge H.C., op cit, vol. 1, pp. 19-20

⁵⁴ Prof. Woker, op cit, pp. 4 & 13

⁵⁵ Case number 3208/2006, op cit, affidavit by Gerry Anderson, par. 5.2, paginated papers, p. 311

the committee. Did he tell the committee about his earlier encounters with Sharemax?

Woker recorded that the committee was approached by two groups of attorneys representing 'major syndication companies' and had been requested to bring '...some type of order in the market'.⁵⁶

One attorney wrote on 7 October 2004: "Our client is probably the largest promoter of unlisted syndication" and "our client wholeheartedly agrees that the industry should be regulated."⁵⁷

It cannot be said with any degree of certainty who's attorney made the comments but coincidentally it concurs with the type of statements Sharemax's attorney Coenie Willemse had been making all along by presenting Sharemax as the father of morality in the syndication industry. Willie Botha took a similar line in court papers in Sharemax's application for an interdict against me and even attempted to co-opt the regulators. I'll also return to that later.

Woker also identified inflated property prices as a major problem.⁵⁸ Incidentally that was a major feature of the Oude Molen debacle involving Willie Botha and his brother Durandt.⁵⁹

Woker also quoted from one of my columns, referring to "a subculture in the property syndication industry where shares are being sold without a prospectus being issued."⁶⁰ The column dealt in particular with PIC Syndications and Oude Molen No. 4, but Sharemax and Willie Botha also featured. As such the column was purportedly considered as 'evidence' by the committee.

During that time I was visited by a inspector of the Department of Trade and Industry Dr Hennie Dekker. I handed him a copy of my research catalogue pertaining to property syndication.⁶¹ I do not know whether it was used

⁵⁶ Ibid, p. 9

⁵⁷ Ibid,

⁵⁸ Ibid, p.10

⁵⁹ See chapter 4

⁶⁰ Basson, Deon. *Familiar ring to PIC scheme*, Finance Week, 2 June 2004, p 15

⁶¹ Basson, Deon. *The Property Syndication Collection*. First edition: April 2004. Regularly updated.

<http://www.deonbasson.co.za/LinkClick.aspx?fileticket=IVEkWRTTTmg%3d&tabid=55&mid=382>
retrieved on 23 June 2008

by the committee. I was never asked for copies of documents listed in the catalogue, all of which are public documents.

The section 417 insolvency inquiry⁶² into Oude Molen No 6 got started some three weeks before Woker signed her report. The inquiry was not completed when she signed her report, and was still under way by the time the FSB granted Sharemax its FSP license. Given the serious allegations of which the committee was aware, it might have made sense to wait until the evidence before the liquidation inquiry became public. The same applies to the granting of the FSP license by the FSB.

In July 2005 I pointed to problems with the disclosure of basic information by way of complete financial statements to investors ahead of annual general meetings held between 25 and 27 July 2005.⁶³ From her report it's unclear whether Prof. Woker's committee had looked into this or had access to the financial statements in question. As we know, it later transpired that the financial statements had not been filed with the Registrar of Companies as is required by section 302 (4) of the Companies Act.⁶⁴ The question is whether the FSB had considered these relevant facts before taking a decision on Sharemax's FSP license.

The further question is whether the FSB's inspectorate did their own investigations before the granting of the licenses to the Sharemax and PIC. Or did they rely on Prof. Woker's report which had not been released at that stage, and didn't name any of the three companies?

In 1997 the Nel Commission noted the insufficient capacity of the FSB in this regard:

"Adequate supervision is impossible with its inadequate budget and a handful of inspectors. According to its 1996 annual report, only 42 inspections had been carried out during the period 1 April 1995 to 31 March 1996..."⁶⁵

⁶² Oude Molen Properties No. 6 (in likwidasie) Meester Verwysing No T 442/05. *Ondervraging in terme van Artikel 417 & 418 van die Maatskappwet, 61 van 1973, soos gewysig*
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⁶³ Basson, Deon, *Sharemax meetings*, Finance Week, 20 July 2005 www.finweek.co.za

⁶⁴ See chapter 7

⁶⁵ Nel, Mr Justice H.C., op cit, vol. 1, p. 39

The current mission of the FSB's inspectorate is, among others, to provide "Registrars of Financial Institutions with objective, timeous, fitting and functional high quality inspection reports... in a cost effective manner in order to serve the public interest..."⁶⁶

In the 2007 financial year the FSB's inspectorate undertook 18 inspections⁶⁷ compared to 26 the year before.⁶⁸ This is much less than the 42 recorded by the Nel Commission for 1996.

In the run-up to granting an FSP license to Sharemax, forensic accountant André Prakke, who later filed a detailed forensic report⁶⁹ in my court case, had an appointment with Anderson. It was on 24 March 2005 at 10:00 and about a matter totally unrelated to property syndications.

During the conversation the name of Leaderguard popped up. Prakke warned Anderson that the company would collapse sooner rather than later.⁷⁰ Anderson disagreed strongly. Weeks later Leaderguard went into liquidation. In its annual report for the 2006 financial year the FSB reported that the Registrar of Financial Services Providers requested inspections into the affairs of 210 intermediaries involved in a "collapsed foreign exchange trading scheme". It is widely accepted that these inspections were into the intermediaries who dealt with Leaderguard. "Based on the findings of the inspection reports, the Registrar is considering regulatory action against a number of the intermediaries concerned", the annual report recorded.⁷¹

The FSB's 2007 annual report stated that "considerable time, effort and resources were spent conducting the Fidentia and related entities inspection." The FSB inspectorate continued to support law enforcement

⁶⁶ <http://www.fsb.co.za/> retrieved on 26 June 2008

⁶⁷ FSB, annual report, 2007, p. 17

⁶⁸ FSB, annual report, 2006, p. 17

⁶⁹ Case number 3208/2006. *Forensic Accountants Report prepared by A.E. Prakke B. Com CA (SA)*.

Paginated papers, pp.

⁷⁰ Various conversations between 2006 and 2008 with Prakke

⁷¹ Ibid

agencies and the curators of Fidentia, Ovation and Common Cents.”⁷²

The problem is that both the Leaderguard and Fidentia inspections started too late. As early as September 2005 Rudi Bam, a former employee of Fidentia, and the JSE Securities Exchange had warned the FSB about the shenanigans at Fidentia.⁷³ Only about nine months later was an inspection initiated by the Registrar.⁷⁴ Gerry Anderson later deposed that they received “disturbing information” from a former director of Fidentia Asset Management.⁷⁵ The name of the person is not mentioned and nothing is further revealed about the role that Bam played early-on in uncovering this debacle.

FSB spokesperson Russel Michaels later stated: “We saw Rudi Bam in March 2006. We had reasons to be cautious as he was in litigation with Fidentia. We had had dealings with Mr Bam previously.”⁷⁶

Coincidentally, while the FSB was ostensibly ignoring Bam’s first allegations about Fidentia, PIC got its FSP license, on 8 November 2005.⁷⁷ PIC had been raising funds long before that date. As was the case with Sharemax, it would have made sense to delay the granting of its FSP license until all the evidence before the section 417 inquiry into Oude Molen No 4 had been released.

Of relevance for both Willie Botha (Sharemax) and Durandt Botha (PIC) is part 2 of the Fit and Proper requirements promulgated in terms of the FAIS Act as it was at the time of the issuing of the two licenses.⁷⁸ The

⁷² FSB, annual report, 2007, p. 17

⁷³ Letter from Rudi Bam to Trevor Manuel, Minister of Finance, 26 November 2006, p. 2

⁷⁴ Cape Good Hope Division of the High Court. *Ex parte application of the Executive Officer of the Financial Services Board in relation to Fidentia Asset Management and other companies*. Founding affidavit of Gerry Anderson, par. 7.1

⁷⁵ Ibid

⁷⁶ Johns, Lynette. *Fidentia probe started ‘too late’*. IOL, 30 June 2007. More about Rudi Bam’s history and his role in exposing the Fidentia scam in chapter 16.

http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20070630104638673C815225

retrieved on 29 June 2008

⁷⁷ Financial Services Board license number 20878, 8 November 2005

⁷⁸ Government Gazette No 25682, 6 November 2003. *Determination of fit and proper requirements for financial services providers, 2003*

opening sentence is pertinent: "An applicant must be a person who is honest and has integrity."⁷⁹

The first question is whether Boyd can vouch to Willie Botha's integrity in the light of his very first experiences with him in 2002 and 2003. Certainly this is something that Anderson and his colleagues should have taken into account.

The second issue is the Oude Molen history.⁸⁰ Here the issue is whether Anderson and his colleagues afforded themselves sufficient opportunity to consider all the facts. I have serious doubts based on the history outlined above. In determining whether an applicant "is honest and has integrity" the registrar may refer to any information in his possession or that has been brought to his attention.⁸¹ He 'may' do so, but did he choose to do so? Once again I'm doubtful whether the FSB did in fact consider all relevant information prior to granting the licences. It may very well make sense to replace the word 'may' in the regulations with 'must'.

The regulations list various circumstances that disqualify a person from being judged "fit and proper". It's a pretty long list but generally one can say that if, during a period of five years preceding the license application, a person has been found guilty in a criminal court, a civil court, by a professional or financial services industry body or has been denied membership of a professional body, the FSB may disqualify such a person.⁸²

Acting fraudulently, dishonestly, unprofessionally, dishonourably, in breach of fiduciary duty, negligently or incompetently may place a person's 'fit and proper' status in jeopardy.⁸³

Once again, it's doubtful that the FSB, or for that matter the Consumer Affairs Committee, has gone deeply enough into the affairs of Oude Molen. It is equally unlikely that they have vigorously followed through on their investigations for possible civil and criminal action.

⁷⁹ Ibid, p. 6

⁸⁰ See chapter 4

⁸¹ Government Gazette No 25682, op cit, p. 6

⁸² Ibid, p. 6

⁸³ Ibid

The “period of five years” stipulated above may very well have played a role in judging whether and how to respond to the Oude Molen shenanigans. It is uncertain when it was considered that the Oude Molen scenario had finally ended. The fact is, it was still playing itself out at the time the FSP licenses of Sharemax and PIC were granted. Willie Botha’s egg dance about his involvement⁸⁴ in Oude Molen and DW Promotion is significant in the context of Sharemax’s FSP application.

It is also noteworthy that DW Promotion was liquidated on 20 August 2005, about three weeks before Sharemax’s FSP license was granted, and only days after Prof. Woker signed her report.⁸⁵

Another disqualifying factor is if a person has been found guilty by any regulatory or supervisory body.⁸⁶ Here, Boyd’s first experiences with Sharemax Investments CC are relevant. To what extent was it followed up, or was it simply that Sharemax was given an “indemnity”? Strangely, it would appear that what went wrong early-on didn’t carry much weight when the FSP license was granted.

A further disqualifying factor is if authorization to carry on business has been refused or the business has been suspended.⁸⁷ Once again the early history of Sharemax Investments CC with the FSB is relevant.

Then the final “fit and proper” straw:

“An applicant must in the application be candid and accurate and must of own accord disclose all facts or information at the disposal of, or which may be accessible to the applicant, and which may be relevant for purposes of a decision by the registrar that the applicant complies or does not comply with subparagraph (1)” (meaning that an applicant must be a person who is honest and has integrity).

I cannot venture an opinion here in relation to Sharemax or PIC because I didn’t see the applications. All I know from my experiences is that Sharemax and PIC are

⁸⁴ See chapter 4

⁸⁵ Transvaal Provincial Division of the High Court. *Ex parte application for the liquidation of DW Promotion*. Case number 29722/2005. Founding affidavit of Douw Gerbrand Breytenbasch. Also see chapter 4.

⁸⁶ Government Gazette No 25682, op cit, p. 7

⁸⁷ Ibid

extremely reluctant to make information available to the public.⁸⁸ During discovery proceedings in my court case against Sharemax this tendency was reconfirmed.⁸⁹ One never knows, Sharemax and PIC's applications for FSP licenses and the supporting documentation may very well become public documents one day. Are their ducks in a row and did the FSB take all reasonable steps to ensure just that?

A decision to grant an FSP license is no minor matter. In a determination linked to the Leaderguard debacle FAIS Ombud Charles Pillai emphasized:

In making a decision, the registrar is expected to apply his mind carefully and thoroughly to all information presented to him in the application form. The registrar is also not confined to the information contained in the application form...Section 8 [of the FAIS Act] deals with authorization of FSP's. This section goes to the heart of licensing and licensing requirements for FSP's. This section is crucial to the proper application of the FAIS Act and is central to the achievement of the purposes of the FAIS Act, namely, to regulate the rendering of financial services to clients. Everything should begin with a license. It must be accepted that licensing and the administration of licenses is the first step towards effective regulation and control. Equally one must then accept that application for licenses by would be FSP's must be treated carefully and seriously and the criteria set out in section 8 must be strictly applied. Failure in this will immediately undermine the very purpose of the FAIS Act.⁹⁰

Whatever the situation, Sharemax got its FSP license. Sooner, rather than later, it did what Masterbond had done in 1984 with its registration as a participation bond scheme⁹¹ – it used it as a commercial tool to raise vast amounts of money from the public and as a tool to gain unmerited credibility.

It didn't change anything in its frail business model⁹² and its strenuous efforts to avoid full disclosure. This was demonstrated in the embarrassing episode Sharemax had when the Freedom Front Plus asked questions in

⁸⁸ See chapter 7

⁸⁹ See chapter 1

⁹⁰ Determination in the Office of the Ombud for Financial Services Providers. *Selwyn Comrie vs Ewing Trust Company Limited*. Case number FOC1807//05/KZN (5)

<http://www.faisombud.co.za/index.php?opt=pages&value=determinations&year=2007&id=89&read=yes> retrieved on 27 June 2008

⁹¹ See chapter 3

⁹² Ibid

Parliament and the subsequent performance to withhold financial statements from me.⁹³

The questions to Minister of Finance, Trevor Manuel and the Minister of Trade and Industry, Mandisi Mpahlwa were asked on 15 November 2005 by MP Willie Spies and have to this day not been answered by the ministers.

Time has caught up on many of the questions anyway because some of the information requested has entered the public domain through other avenues. The questions were relatively simple and straightforward and it was sad to see that accountability to Parliament on these issues was not a huge priority.⁹⁴

By the time Spies asked his questions the FSP licenses had been granted, which would have made it an embarrassment to answer some of them.

What Willie Spies told Parliament⁹⁵

Institutions like the FSB, the Registrar of Companies, the SA Reserve Bank and the police all have one common aim – to serve and protect the public.

Over the years, billions of rands have been invested by unsuspecting and uninformed members of the public in so-called pyramid schemes and shady investment schemes.

Several public companies bearing the name Oude Molen were recently placed under liquidation. Senior citizens in particular invested in these schemes and suffered substantial losses⁹⁶ because of the collapse of the property syndication schemes.”

According to information at the disposal of the FF Plus, the so-called Oude Molen companies bought properties for a total amount of only R3,8m and syndicated them to an unsuspecting public for R24,7m.

When the scheme collapsed, the public discovered that the properties were nowhere near the value that they had invested in them. The same people who were involved in the Oude Molen scheme are still operating similar investment schemes, which have already drawn billions of rands of investments from the public.

Manuel did reply orally to Spies’ members’ statement and said that no law can protect people against their own stupidity. The FSB and the SA Reserve Bank register banks and other institutions but that doesn’t stop *bucket shops* from operating.⁹⁷ What he didn’t say was that the FSB was handing out licenses to these *bucket shops*.

⁹³ See chapter 7

⁹⁴ See annexure 5 for the questions to the ministers

⁹⁵ Basson, Deon. *Pertinent questions*. Finweek, 23 November 2005 www.finweek.co.za

⁹⁶ See chapter 4

⁹⁷ *Pertinent questions*, op cit

I noted in my subsequent column that Manuel had proved in the past (such as with the Tigon/PSCGG scheme) that he has acute insight into questionable investment schemes. I therefore expected his invitation to Spies to write him a note to yield tangible results. This time around I was wrong.

There was one point where I didn't agree fully with Manuel. Especially in SA circumstances:

It's true that it's difficult, or even impossible, to protect people from themselves.

But it's unfair to expect people to protect themselves if the State doesn't fulfill its most basic responsibility of ensuring that public information is readily available. Eight years ago, the Nel commission referred to the Registrar of Companies as an "antique filing cabinet".

Huge investments in technology have since been made at the institution. But has much changed in the approach and ethos.[?] My experience suggests not.

How can an uninformed investor make an informed decision if his adviser doesn't even have easy access to financial statements? Sharemax, one of the companies being mentioned by Spies, has been refusing since June to reply to the simple question of whether full financial statements have been submitted to the registrar.

Sharemax, PIC and other schemes are no longer aimed only at white Afrikaners in Pretoria. Black South Africans are also large investors and are at the mercy of crooked marketing personnel who are often as sly as the craftiest fox. If the Registrar of Companies doesn't do his job that causes a chain of events that prevents the media from doing its job properly.⁹⁸

Since then, so I have been informed, Manuel has instructed the tax authorities to collect their taxes but not to disturb the property syndication scene because he doesn't want thousands of senior citizens on his *stoep*.

During the weeks after the questions in Parliament I continued to publish damning articles and columns about Sharemax. With the benefit of hindsight it can now be said that these articles and columns indirectly questioned the wisdom of granting Sharemax its FSP license.

One of the first syndications done after the granting of the FSP license was Waterglen Shopping Centre.⁹⁹ It demonstrated that an FSP license couldn't inoculate Sharemax against succumbing to sheer greed and congenital non-compliance.¹⁰⁰

⁹⁸ Ibid

⁹⁹ Basson, Deon. *Incredible property valuations*. Finweek, 14 December 2005 www.finweek.co.za

¹⁰⁰ See chapter 13

When Sharemax approached the High Court in February 2006 with an application for an interdict against me, MD Willie Botha was quite upbeat about Sharemax's FSP license and suggested that "Sharemax operates its business under scrutiny of the FSB."¹⁰¹

Anderson repudiated him: "I wish to bring to the attention of the Honourable Court that my office has not scrutinized the applicant's business in the past nor is it doing so on an ongoing basis."¹⁰²

He continued: "I must add that it is my impression that the applicant is over-emphasizing its authorization under section 8 of the FAIS Act to persuade this Honourable Court and possibly also potential investors that the FSB has approved the applicant's product...the FAIS Act's focus doesn't concern the financial product itself."

Botha further stated that Sharemax enjoyed a sound relationship with the FSB.¹⁰³ Again Anderson repudiated him saying that the FSB did not have any relationship with Sharemax other than in terms of the FAIS Act. The FSB did not support Sharemax's property syndication business as such.¹⁰⁴

Botha pushed his luck a bit further by stating that the FSB was satisfied with the 'format of investment'.¹⁰⁵ Anderson replied: "It may be that the FSB is satisfied as to the juristic entity or the structure of the applicant's business but if Botha refers to the property syndication industry in general I cannot concur with his statement."¹⁰⁶

Anderson recorded that Sharemax had submitted an application for an FSP license and, based on the information disclosed to his office at the time, it was concluded that the individuals listed in the application met the fit and proper requirements...Subsequently a license was issued.¹⁰⁷

¹⁰¹ Case number 3208/2006. Willie Botha's founding affidavit, 1 February 2006, par. 66, paginated papers, p. 49

¹⁰² Case number 3208/2006. Gerry Anderson's affidavit, 21 January 2006, par. 4.1, paginated papers, pp. 309-310

¹⁰³ Botha, op cit, par. 20, paginated papers, p. 16

¹⁰⁴ Anderson, op cit, par. 3.1, paginated papers, p. 309

¹⁰⁵ Botha, op cit, par. 19, paginated papers, p. 16

¹⁰⁶ Anderson, op cit, par. 6, paginated papers, p. 311

¹⁰⁷ Ibid, par. 4.4, paginated papers, p. 310

There is in all probability ample reason to reconsider the issuing of the FSP license . Are the antennas of the FSB's inspectorate sufficiently finely tuned? Did the FSB silently put their faith on the property bull market to ride out the regulatory storm? Do the FSB and other regulators understand how big the risks are and do they understand the wide-ranging implications of more or less gratuitously honouring controversial businessmen with 'fit and proper' labels?

By the winter of 2008 market realities were catching up on property syndications as it was impossible to conceal the truth forever.