

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 04229/14-15/ NW 1

In the matter between:-

KENNETH KINGSLEY KWASI BOEMAH

Complainant

and

SANDRO MANUEL AZEVEDO VELOZA

1st Respondent

SILVER SEEDS CAPITAL (PTY) LTD

2nd Respondent

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

A. THE PARTIES

[1] Complainant is Dr Kenneth Kingsley Kwasi Boemah whose details are on file in the office.

[2] First respondent is Sandro Manuel Azevedo Veloza, an adult male director and key individual of second respondent, whose address is 78 Bergshoop Estate, Langeberg Road, Durbanville, Western Cape.

- [3] Second respondent is Silver Seeds Capital (Pty) Ltd, registration number 2001/012586/07, a private company duly incorporated in terms of the company laws of South Africa, with its principal place of business at 2020 Tyger Lake, Tyger Waterfront, Western Cape.
- [4] Second respondent's license was approved on 14 October 2004 and withdrawn by the regulator on 9 September 2014.
- [5] At all times material hereto, Kevin Thomas, a representative of second respondent, rendered financial services to complainant.
- [6] Respondent or respondents must be read to mean both respondents, unless otherwise stated.

B. COMPLAINT

- [7] Complainant, at the age of 58, was advised by Kevin Thomas to invest in Silver Seeds Capital (Pty) Ltd, into what he terms, '*a fixed term investment, with the understanding that I could opt out at any time*'.
- [8] At the time of concluding the investment complainant was employed as support staff to a cabinet minister.
- [9] Following an agreement to pay R5000 every month, the investment began on 1 August 2010 when complainant made the first payment. The agreement was to endure for five years.

- [10] During May 2012, complainant lost his job when the Minister he was supporting was relieved of his duties, following a cabinet reshuffle. As this was complainant's only source of income, he could no longer sustain the investment.
- [11] Complainant later found temporary relief when he became part of some project and was able to generate income. Although he could no longer contribute to the investment, he was able to keep the investment where it was in December 2012. Up until then, complainant had been making infrequent contributions, since he lost employment.
- [12] During January 2014, in need of money to pay university fees for two of his minor children, complainant requested termination of the investment and access to all his funds.
- [13] He claims that at first, respondents acceded to his request but later reneged on the payment. Complainant claims he continued to make several enquiries regarding payment only to be informed by respondents that they were cash strapped, as a result of an agreement to supply Eskom with coal.
- [14] Complainant turned to this office during September 2014, seeking relief against respondents.

C. BACKGROUND

- [15] In his detailed complaint dated 8 January 2015, complainant claims he was *'asked to invest R5000 every month for five years. I opted for a fixed term investment with the understanding from the consultant that I can opt out at any*

time, a practice which is normal with all other forms of investment. At worse, you pay a little penalty for breaking the contract. Their own contract terms say one can exit at any point without any costs'.

[16] Complainant further claimed he had not been furnished with the certificates pertaining to the investments. He was disturbed upon discovering that second respondent was no longer in possession of an FSP license. Complainant impressed upon this office to save his investment.

[17] Annexed to the complaint were copies of the investment statement and the investment contract with second respondent.

[18] At the time of lodging the complaint, complainant had not been paid a cent by respondents.

D. RELIEF

[19] Complainant wants this office to compel respondents to release his total investment in the amount of R144 713. The amount is confirmed by respondents' statement.

E. REFERRAL TO RESPONDENT IN TERMS OF RULE 6

[20] On 30 September 2014 the complaint was referred to respondents in terms of Rule 6 of the Rules on Proceedings.

[21] Respondents filed their response on 18 November 2015. The simple line taken by respondents in their response is that complainant had signed the Client

Advice Record, in which he had agreed to monthly payments for 60 days¹ without access to his funds. Respondents attached to their response copies of the investment agreement and a page titled, 'Invoice/Client Advice record'. The agreement is signed by first respondent and complainant. Later in this determination, I analyse the two documents.

F. NOTICE IN TERMS OF SECTION 27 (4) OF THE FAIS ACT

[22] On 14 April 2015, this office sent a notice in terms of section 27 (4) of the FAIS Act to respondents. The notice was addressed to first respondent in his capacity as the key individual of the second respondent. The notice invited respondents to demonstrate that:-

22.1 its representative was authorised at the time, to render financial services in respect of the product sold to complainant.

22.2 prior to advising complainant, in line with the dictates of section 8 (1) of the General Code of Conduct for Authorised Financial Advisors and Representatives, (the Code), respondents had taken reasonable steps to:-

22.2.1 seek appropriate and available information regarding the complainant's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice.

22.2.2 conducted an analysis for the purpose of the advice, based on the information obtained.

¹ Was meant to be 60 months.

22.2.3 identified the financial product or products that would be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any other contractual arrangement.

22.3 Respondents were further invited to provide records of their oral exchanges, as required by section 3 (2), and that of advice in terms of section 9 of the Code.²

22.4 Respondents were further asked to deal with the risk inherent in the product, along with an explanation as to how such risks aligned with the client's needs and objectives.

[23] Notwithstanding several reminders, respondents failed to respond to the notice. The complaint however, remains unresolved.

G. DETERMINATION

[24] The complaint is determined without the benefit of respondents' full version of events. Since responding to the Rule 6 (b) notice, respondents have showed no interest in co-operating with this office. The office has written to respondents on several occasions calling upon them to file their response to the section 27 (4) notice, to no avail.

² In terms of the section, a record of advice must set out a brief summary of the information and material on which the advice was based, the financial products that were considered and the financial product recommended to the client with an explanation of why the product or products selected is likely to satisfy the client's need and objectives.

[25] Instead of responding to the notice, respondents simply sent an e-mail authored by an Eddie Amaro, (Amaro) apparently one of second respondent's directors on 18 November 2014. In the e-mail, Amaro, simply noted, '*As you can observe the client signed the Invoice/Client Advise Record in which he agreed to monthly payments of 60 days without access to funds. I attach a copy of the agreement (has a buy back date of the 1 August 2015) for your perusal.*' (copied as is from the email)

[26] **Issues for determination:**

The issues to be determined here are:-

26.1 whether respondents, in rendering financial services to complainant violated the FAIS Act and the Code in any way;

26.2 should it be found that respondents were in breach of the FAIS Act and Code, whether such violation caused the loss now complained of by complainant;

26.3 quantum.

Whether respondents violated the FAIS Act and the Code in any way while rendering financial services to complainant

[27] Respondents had been asked to furnish this office with their records in terms of section 3 (2) and 9 of the General Code. Respondents simply filed the two documents, namely, their Invoice/Client Advice Record and a copy of the agreement. They did not provide the record in terms of section 3 (2).

Invoice / Client Advice Record

- [28] Given respondents' insistence that complainant signed the 'Invoice/Client Advice Record, a close examination of this document is necessary.
- [29] The Invoice/Client Advice Record is a single standard page, which contains, amongst other details, complainant's name, postal address and signature; these being the only references to complainant. Other than what has already been mentioned, the document contains no other details regarding complainant. Essential and relevant information is conspicuously missing from this document.
- [30] There is no information with regard to complainant's personal financial circumstances, his needs, objectives, financial product experience, risk appetite and tolerance. Despite diligent search, there is not even something as basic as how complainant generates income, the frequency thereof and what his monthly expenditure is. The aforementioned are just some of the details that a provider would need in order to conduct an analysis to meet the goal of recommending a solution that is suitable to the client's circumstances.
- [31] This information, which the provider must seek from their client, is in line with the dictates of section 8(1) of the Code. The section proceeds as follows:
A provider other than a direct marketer, must prior to providing a client with advice-
- (a) take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product

experience and objectives to enable the provider to provide the client with appropriate advice;

(b) conduct an analysis, for the purpose of the advice, based on the information obtained;

(c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangements.

[32] That the document forwarded by respondents only had complainant's name, address and signature as the only personal references to complainant is telling.

[33] Here are some interesting extracts from the document:

Description

It is noted that complainant purchased 240 000 UG2 Platinum Ltd Shares at 125c, for the amount of R300 000. (I say more about UG2 Platinum later.)

[34] The document further notes:

*- 'You have indicated a clear interest to invest **your excess capital in a venture capital share** with a Fixed/Flexi Savings Option Agreement. (own emphasis)*

Before going any further, there is no basis on the part of respondents to conclude that the amount paid by complainant towards the investment was excess capital. Respondents had not satisfied themselves as to complainant's financial situation. They did not even know whether complainant had provision for emergency funding, in line with his circumstances.

The document further proceeds:

34.1 *You have been advised of the following:*

Silver Seed Capital

- *'is an Authorised Financial Services Provider FSP 17142*
- *has an FSP licence category 1.8, which allows it to act as an advisor and - does not have PI cover*
- *deals with new public companies, which are classified as **high risk/high return.** (own emphasis)*
- *consultants do not earn in excess of five percent commission on investments.*
- *consultant's (sic) derive more than thirty percent of their income from one product.*
- *the shares from Silver Seeds Capital are mainly capital **growth shares with a potential exit at a listing on an exchange...***
- *may have an interest in the companies of which shares are being sold.*
- *hereby confirms that you have elected to become an SSIA member and thus have an interest in Venture Capital Investments (emphasis and italics mine)*

34.2 Reason for offering the investment is recorded as – '**Client needs best return on savings without access to funds.**' (own emphasis and italics)

[35] The question that comes to mind is, against what background did the provider conclude that this investment is suitable to complainant's needs and circumstances. The answer is simple; the document was never intended to be a record of advice as envisaged by the Code.

[36] Section 9 of the Code stipulates the information that must be contained in the record of advice:

36.1 brief summary of the information and material on which the advice was based;

36.2 the financial products that were considered;

36.3 and the financial product recommended to the client with an explanation of why the product or products selected is likely to satisfy the client's need and objectives.

[37] There is no mention of how the provider concluded that the high risk venture capital investment was suitable to address complainant's needs and objectives.

[38] It is also telling that while complainant has a simple description of a savings with a fixed amount of R5000, out of which he could opt out of at any time, the invoice/client advice record points to a totally different product, one that is high risk and commits complainant to staying the course with the potential exit being the date of listing of the share onto some stock exchange.

[39] There is no background to determine just how the provider concluded that the unlisted shares of UG2 Platinum Limited were likely to address complainant's needs.

[40] While it is clear from the document that complainant's funds went into the high risk terrain of venture capital market, there is no warning that complainant could lose a portion or his entire capital.

- [41] It is apparent from the document that one of the material features of the investment, namely costs, both entry and exit were never disclosed to complainant.
- [42] As for complainant electing to become a member of SSIA, there is little doubt that complainant would know what SSIA means, what it stands for and the legal implications of becoming a member thereof.
- [43] There are zero probabilities that complainant, at age 58, with minor children and an insecure job would have agreed to go ahead with the investment, notwithstanding the attendant risk of losing some or all of his capital, had these been explained.
- [44] It is not difficult to conclude that the document was never explained to complainant; he was merely asked to sign. It is apparent from the document that respondents only obtained their client's signature in order to demonstrate that the client consented to the investment. That the document is devoid of all necessary information to comply with section 8 (1) was clearly not a priority for respondents.
- [45] With such contempt for the law as demonstrated in respondents' action, respondents now want this office's *imprimatur* to further make a mockery of the FAIS Act and the General Code.

Fixed Savings Option Agreement

[46] I turn now to analyse the Savings Agreement between complainant and respondents.

[47] Of all the clauses in the agreement, one clause stands out. Clause 9 sets out the far reaching consequences of breach of the agreement. The clause reads:

'Should either party commit a breach of any provision of this Agreement and fail to remedy such breach within 14 (fourteen) days of despatch of a written notice from the other party requiring the defaulting party to do so, then such other party shall be entitled, without prejudice to his /its other rights in law:

9.1 to cancel this Agreement and retain all amounts paid by the Client as 'rouwkoop' and/or as an agreed pre-estimation of liquidated damages deemed to have been suffered by Silver Seeds up to the date of such cancellation or

9.2 to cancel this Agreement and to claim the full outstanding balance of any fees owing by the Client without further notice.

[48] On a proper construction of this provision, even if complainant had defaulted in month 58 (two months before the end of the investment term) he would forfeit the entire investment in favour of the product provider.

[49] In view of the far reaching consequences of this provision, one would have expected the provider to:-

- (i) have carried out an analysis of the client's financial information, to satisfy himself that the investment is in line with the client's means and circumstances.
- (ii) fully disclosed all the material aspects of the agreement.
- (iii) take time to ensure that the client understood the advice and treated him fairly.

[50] There is no evidence that this was done by respondents. This is unconscionable conduct on the part of respondents.

UG2 Platinum Ltd

[51] Following in-depth investigations, this office was able to verify that first respondent and Eduardo (Eddie) Amaro, (both directors of second respondent) are in fact directors of UG 2 Platinum Ltd, along with two others individuals.

[52] First respondent is noted in the CIPC records as the company secretary of UG2 Platinum Ltd. Respondents were conflicted in this matter and had failed to disclose this to complainant. The vague statement contained in their Invoice/Record of Advice would not assist respondents as it fails to meet the requirements of section 3 (1) (c) of the Code.

[53] Section 3 (1) (c)³ of the Code aims to mitigate the far reaching consequences of conflict of interest. Regrettably respondents had no time for the Code, they were on their way to enriching themselves.

³ Section 3 (1) (c) calls upon providers, at the earliest reasonable opportunity, to:

[54] Complainant was treated unfairly.

H. CAUSATION

[55] Complainant in his complaint makes the point that he was invited to invest in a fixed savings where he could opt out at any time without any cost implications. Respondents have not denied this. In their response to the Rule 6 (b) letter, they simply said that complainant had agreed to the investment. They did not challenge that they invited complainant to the investment. At the very least, respondents were the factual cause of the investment.

[56] Information before this office demonstrates that respondents did not at any stage prior to recommending the transaction take steps to ascertain whether the product recommended was suitable to complainant's circumstances.

[57] Complainant was employed as support staff to a cabinet minister. It is not far-fetched to state that respondents did not know what complainant did at the time for a living and how he generated his income. There was the first alarm bell that the provider ignored. Respondent ought to have enquired on the nature of

(i) disclose to a client any conflict of interest in respect of that client including

(aa) the measures taken, in accordance with the conflict of interest management policy of the provider referred to in section 3 A (2), to avoid or mitigate the conflict;

(bb) any ownership interest or financial interest, other than an immaterial financial interest, that the provider or representative may be or become eligible for;

(cc) the nature of any relationship or arrangement with a third party that gives rise to a conflict of interest, in sufficient detail to a client to enable the client to understand the exact nature of the relationship or arrangement and the conflict of interest....'

complainant's employment status. He neglected this. It is no secret that some staff that support political office bearers have no security of tenure.

[58] A provider acting in his client's interest would want to know how his client generates his income and recommend solutions that are suitable to the client. In this case, the provider appears to have been on a 'hit and run' mission without any regard to the consequences of his recommendation.

[59] It should have been clear to the provider that in the event complainant was not able to see the term of the investment through, he would be severely prejudiced, based on section 9 of the agreement. Likewise, it ought to have been in the provider's knowledge that in the event the product failed for any reason, complainant would lose out. None of these were explained to complainant, according to the information presented to this office.

[60] In an attempt to saddle complainant with liability, respondents conveniently hid behind the terms of the agreement, stating that complainant had agreed to the transaction.

[61] On this score alone, respondents demonstrated their ignorance to comply with the FAIS Act and the Code. The contract cannot be used to demonstrate compliance with the Code. The client contracts with the benefit of the advice provided by the provider.

[62] Based on the information before this office, respondents were the sole cause of complainant's loss.

I. FINDINGS

[63] Section 8 of the Code enjoins providers to act with circumspection prior to advising clients. As noted in paragraph 22.4 respondents had to gather necessary and available information to analyse and understand complainant's circumstances. It is expressly provided in section 8 that providers analyse the client's information and match the risk involved in the product with the risk tolerance of the client.

[64] Section 7 enjoins providers rendering financial service to disclose the material aspects of the product. The material terms of the contract were unknown to the complainant at the time of concluding the investment.

[65] Section 2 requires all providers to render financial services with due skill care and diligence, in the interests of their clients and the integrity of the financial services.

[66] In respect of all these sections, respondents' conduct failed to meet the standard prescribed by the Code.

J. QUANTUM

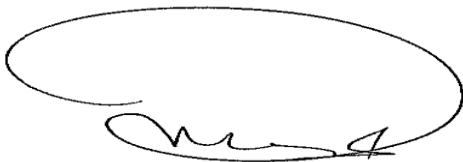
[67] Complainant's version is that he contributed R144 713 towards the investment. This amount is borne out by respondent's own statement. Up to this point, complainant has not been paid anything. This is the amount I intend to award to complainant.

K. ORDER

[68] In the premises the following order is made:

1. The complaint is upheld;
2. Respondents are hereby ordered jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R144713.
3. Interest at the rate of 9 %, per annum, seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 8th DAY OF MARCH 2016.

A handwritten signature in black ink, enclosed within a large, hand-drawn oval. The signature appears to be 'Noluntu N Bam'.

NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS