

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 00362/16-17/ LP 1

In the matter between:

KGOROSHI REVONIA MORULANE

Complainant

And

SILVER SEED CAPITAL (PTY) LTD

First Respondent

SANDRO MANUEL AZEVEDO VELOZA

Second Respondent

DION CHINNAIAH

Third Respondent

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

A. THE PARTIES

[1] The complainant is Kgoroshi Revonia Morulane, an adult female whose details are on file with this Office.

[2] The first respondent is Silver Seed 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 202 Tyger Lake, Niagara Avenue, Tyger Falls, Bellville, Western Cape. The first respondent's license was approved on 14 October 2004 and withdrawn by the regulator on 9 September 2014.

[3] The third respondent is Dion Chinnaiah, an adult male representative of first respondent whose last known address was 202 Tyger Lake, Niagara Avenue, Tyger

Falls, Bellville, Western Cape. At all times material hereto, the third respondent rendered financial services to complainant.

- [4] Respondent or respondents must be read to mean all respondents, unless otherwise stated.

B. COMPLAINT

- [5] The complainant invested an amount of R35 000 on 21 February 2013 in UG2 Platinum Ltd Shares, with the assistance of one Dion Chinnaiah. This amount provided the complainant with 35 000 shares at a cash-per-share price of 1 cent.

- [6] The respondent gave the complainant an assurance that the investment was for a period of 12 months, and that he would receive a tax-free return of 12% upon maturity. The respondent emphasised that the capital and interest could only be accessed after the said period (12 months).

- [7] Upon the completion of the 12 month period on 22 February 2014, the complainant proceeded to request a withdrawal of her capital, however despite numerous attempts to contact the respondent, the complainant's funds remain outstanding.

C. RELIEF SOUGHT

- [8] The complainant requires that the respondent repay her capital in the amount of R35 000.

D. REFERRAL TO RESPONDENT

- [9] On 22 April 2016, the complaint was referred to the respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office (hereinafter referred to as the "Rules"), and required after a six weeks period to revert to this Office with its full version of events and copies of its complete file of papers relating to the complaint. No response was received.

[10] On 17 February 2017, the respondent was provided with another opportunity to respond to the Rule 6 (b) correspondence, and it was also reminded of its duty in terms of Rule 6 (f) of the Rules on Proceedings of this Office. No response to this letter has been received.

[11] On 21 January 2019, a notice in terms of section 27 (4) was sent to the respondent, advising him that the matter was now accepted for investigation and requesting that he reverts with his statement together with documentation, including any documents that support his version and compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives ('the Code'). The notice further informed the respondent that failure to respond would result in the complaint being upheld and determined. Despite this letter being sent, the respondent failed to submit any response.

E. DETERMINATION AND REASONS

[12] Having received neither the requested response nor the supporting documentation, the matter is determined on the basis of the complainant's version.

[13] The issues for determination are:

13.1 Whether the respondents in rendering the financial service complied with the provisions of the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives, (the Code)?

13.2 Whether the respondents' conduct is the direct cause of the complainant's loss?

13.3 Quantum of such loss.

Failure to disclose costs and conflict of interests

[14] The complainant purchased unlisted shares in UG2 Ltd. This fact was disclosed to the complainant. This investment's selling point was that the complainant has an option to exit part or the entire investment at maturity date, which would be after 12 months.

Should the complainant elect to exit after 12 months, the first respondent would pay the repurchase price at a return rate of 12%¹. Furthermore, the investment gives the investor 'a fixed return, achieving maximum growth, with no access to the capital or return during the term², and the investment attracts Capital Gains Tax and offers a 75% tax saving in comparison to Income Tax.³

[15] Following previous investigations conducted by this Office⁴, it was confirmed that the second respondent who is a director of the first respondent, is in fact a director of UG2 Platinum Ltd. The second respondent is noted in the CIPC records as the company secretary of UG2 Platinum Ltd. The respondents were conflicted in this matter and had failed to disclose this to the complainant. In contravention of section 3 (1) (c) of the Code.

[16] The respondent would appear to have a calculated *modus operandi* of targeting selected investors under the auspice of extravagant returns, with no evidence on how these returns would be paid.

The FAIS Act and the Code

[17] It cannot be disputed that at all material times, the respondent provided financial services to the complainant. The specific form of financial service that this complaint is concerned with, is advice. Advice in terms of section 1 of the Act, includes any recommendation, guidance or proposal of a financial nature furnished to a client. The advice has to meet the standard prescribed in the Code.

¹ This statement was noted on Twelve12 Option application form

² Refer *ibid.*

³ Refer *ibid.*

⁴ See in this regard the matter of KKK Boemah v Silver Seed Capital (Pty) Ltd, FAIS-04229-14/15 NW 1, available on www.faisombud.co.za/determinations

- [18] Section 2 of the Code provides that a 'provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.'
- [19] Section 8 (1) of the Code dictates that a provider must, prior to providing a client with advice;
- 19.1 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;
- 19.2 conduct an analysis for the purpose of the advice, based on the information obtained; and
- 19.3 identify 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.
- [20] There is no evidence that the respondent complied with this section of the Code. There is further no proof that the respondent considered his client's financial position, and why the investment was appropriate for the complainant's means and circumstances. The respondent failed to ensure that his client understood the advice and failed to treat her fairly.
- [21] Section 3 (1) (c)⁵ of the Code deals with the consequences of conflict of interest. It is evident from the information provided earlier, that the respondent disregarded the Code. The respondent had a substantial interest in the company the complainant was investing her money into, and failed to disclose this fact.

⁵

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

(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....'*

[22] The respondent further failed to disclose all material aspects of the investment to his client. There is no indication that the complainant was truly aware of the risks inherent to the investments, or that she was investing in high risk ventures where her capital could be lost. Documentation previously presented to this Office confirmed that payment of the capital will depend on the circumstances of the respondents.

F. CAUSATION

[23] The questions that must be answered is: but for the respondent's materially flawed advice and actions, would the complainant have suffered financial loss, and secondly, whether the non-compliance of a provision of the Code can give rise to legal liability, whether in contract or delict.

[24] The first question can be answered by citing the decision of the Appeals Board that *"the liability of a provider to a client is usually based on a breach of contract. The contract requires of a provider to give advice with the appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and that it caused loss. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs."*⁶

In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability. In both instances the breach must be the cause of the loss....."

⁶ J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge FAB 8/2016, paragraphs 41 – 44

[25] There is sufficient information to suggest that the respondent had not been honest with the complainant about the nature of the investments, or his involvement in the entities. The only conclusion to be made is that the complainant's money had been misappropriated.

[26] When the complainant made the investment, she based it solely on the representations made by the respondent. Consequently, as a result of the respondent's failure to adhere to the Code, the complainant made the investments and lost her capital. The respondents' conduct is the sole cause of the complainant's loss.

G. ORDER

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

1. The complaint is upheld.
2. The respondents are hereby ordered jointly and severally, the one paying the other to be absolved, to pay the complainant the amount of R35 000.
3. Interest at the rate of 10%, per annum, seven (7) days from date of this order to date of final payment.
4. The matter will be escalated to the FSCA for further consideration and to take further steps where deemed necessary.
5. The complainant should consider reporting the second respondent to the SAPS's Commercial Crimes Unit.

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

DATED AT PRETORIA ON THE 25th DAY OF MARCH 2019.

A handwritten signature in black ink, consisting of several overlapping loops and a final downward stroke.

**NARESH S TULSIE
OMBUD FOR FINANCIAL SERVICES PROVIDERS**