

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 01636/17-18/ WC 1

In the matter between:

LIONEL JOHN WHITE

Complainant

and

SILVER SEED CAPITAL (PTY) LTD

First Respondent

SANDRO MANUEL AZEVEDO VELOZA

Second Respondent

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

A. INTRODUCTION

[1] The complainant was approached by a representative of the first respondent to invest in a new platinum mine venture called UG2 Platinum Ltd. The complainant, on advice that it was a safe investment, purchased shares in the amount of R35 000.

[2] The complainant never received any returns on his investments, and finally decided to withdraw his money during 2016. However, despite various attempts to recover his capital, the complainant has been unable to access his funds.

B. THE PARTIES

[3] The complainant is Lionel John White, an adult male whose particulars are on file with the Office.

- [4] The first respondent is Silver Seed Capital (Pty) Ltd, registration number 2001/012586/07, a private company that was duly incorporated in terms of the company law of South Africa. According to CIPC records obtained, the company has been deregistered in 2010. Information received from the Regulator confirms the first respondent's address to be 1st Floor, Willowbridge Centre, Carl Cronje Drive, Tygervalley. The first respondent's license was approved on 14 October 2004 and withdrawn by the Regulator on 9 September 2014.
- [5] The second respondent is Sandro Manuel Azevedo Veloza, an adult male representative, key individual and director of the first respondent, whose last known address is 78 Bergshoop Estate, Langeberg Road, Durbanville, Western Cape.
- [6] 'Respondent' or 'respondents' must be read to mean all the respondents, unless otherwise stated.

C. COMPLAINT

- [7] The complainant made his first investment of R15 000 during May 2005, with the assistance of one Bradley Shaw, a representative of the first respondent. This amount provided the complainant with 50 000 shares at the ordinary share price of 30 cents.
- [8] The complainant subsequently made two further investments during July and October of 2007 in the amount of R10 000 each, on advice of Robert Watt, another representative of the first respondent.
- [9] The complainant was assured that it was extremely good and safe investments. However, the complainant was advised on several occasions that another mining venture was being pursued, and his investments would be switched accordingly. When the complainant finally decided to withdraw his capital, he was unable to contact the respondent. Despite various calls and e-mails, the complainant has not received his capital.

D. RELIEF SOUGHT

[10] The complainant seeks repayment of his capital in the amount of R35 000.

E. REFERRAL TO RESPONDENT

[11] During February 2018, the complaint was referred to the respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, to resolve it with the complainant. No response was received.

[12] A notice in terms of section 27 (4) was sent to the respondent during July 2018. The notice required the respondent to demonstrate compliance with the Code of Conduct, specifically sections 2, 8 (1), 3 (2), 7 (1), and 9. However, the respondent failed to reply.

[13] The Office has received a number of complaints involving the same respondents. In each instance, the Office received little or no co-operation from the respondents, despite repeated invitations to resolve the complaints with its clients.

F. DETERMINATION AND REASONS

[14] In the absence of a response from the respondent, the matter is determined on the basis of the complainant's version and the available documentation.

[15] The issues for determination are:

15.1 Whether the respondents in rendering financial services, complied with the provisions of the FAIS Act and the General Code of Conduct, (the Code).

15.2 Whether respondent's conduct caused the complainant's loss.

15.3 Quantum of such loss.

The investments

[16] Investigations conducted into UG2 Platinum Ltd previously¹ by this Office, revealed the following:

16.1 The second respondent was in fact one of the directors of UG2 Platinum Ltd, along with two other individuals.

16.2 The second respondent is also noted in the CIPC records as the company secretary of UG2 Platinum Ltd.

16.3 The respondents were conflicted in this matter, and failed to disclose this to the complainant.

[17] A search on CIPC revealed that the second respondent was involved with at least 19 companies from 2001 - 2014, in various capacities, all which had been deregistered. The respondent has a calculated *modus operandi* of targeting selected investors under the auspice of extravagant returns, with no evidence on how these returns would be paid.

[18] The respondent was investigated by the former Financial Services Board, and complainants have been informed to report the matters to the SAPS.

The FAIS Act and the Code

[19] 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 See the matter of Boema v Silver Seeds Capital, FAIS-04229

[20] 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.

[21] Section 8 (1) of the Code dictates that a provider must, prior to providing a client with advice;

21.1 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;

21.2 conduct an analysis for the purpose of the advice, based on the information obtained; and

21.3 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.

[22] 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 investments were appropriate for the complainant's means and circumstances. The respondent failed to ensure that his client understood the advice and failed to treat him fairly.

[23] Section 3 (1) (c)² of the Code aims to mitigate the far-reaching consequences of conflict of interest. It is evident from the information provided earlier, that the respondent

² 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....'*

disregarded the Code. The respondent had a substantial interest in the company the complainant was investing his money into, and failed to disclose this fact.

[24] 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 he was investing in high risk ventures where his capital could be lost. Documentation previously presented to this Office confirmed that payment of the capital will depend on the circumstances of the respondents.

G. CAUSATION

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

[26] I refer in this regard to the decision of the Appeals Board³ in the matter of *J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge*⁴. The Board noted the following:

“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.

³ Effective 1 April 2018, the Board is now called the Financial Sector Tribunal

⁴ FAB 8/2016, paragraphs 41 – 44

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.....”

[27] 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.

[28] When the complainant made the investments, he 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 his capital. The respondents' conduct is the sole cause of the complainant's loss.

[29] As a result of the respondent's conduct, the complainant lost his capital in the amount of R35 000. The respondent is liable to compensate the complainant for his loss.

H. ORDER

[30] 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.

DATED AT PRETORIA ON THIS THE 28TH OF JANUARY 2019.



NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS