IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 05349/14-15/ NW 1

In the matter between:

TSHEGOFATSO PRUDENCE GASEKOMA **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, on advice of the respondent, purchased unlisted shares in what was described as start-up enterprises that were raising capital with the assistance of the respondent.

[2] Despite the respective investments reaching its terms, the complainant has not received her capital back. The complainant subsequently realised that the license of the respondent has been withdrawn. Many attempts were made to contact the respondent to resolve the matter, to no avail.

B. THE PARTIES

[3] The complainant is Tshegofatso Prudence Gasekoma, an adult female 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 the 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 The first respondent's license was approved on 14 October 2004 and withdrawn by the Regulator on 9 September 2014.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 learned of Silver Seed Capital from a friend during 2006. At the time, she was employed as a metallurgist. She contacted the respondent to enquire about investment opportunities, and was advised that she could purchase shares in small companies that were not listed on the stock market, but for whom Silver Seed was raising start-up capital.

[8] The complainant was confident that she was dealing with a registered financial services provider, and that the respondent conducted its due diligence on the investments. She proceeded to make investments on the respondent's advice.

[9] The first investment was made during 2006, when the complainant purchased shares to the value of R25 000 in UG2 Platinum Limited. Despite the maturity of this investment, the complainant has not received her capital back to date.

[10] In October 2008, the complainant mandated the first respondent to acquire shares on her behalf in a company called Lazaron Biotechnologies (SA) Ltd, to the value of R6000. During December 2011, the complainant invested a further R7150 in Lazaron. The money was duly transferred to the account of the first respondent, but to date the complainant has not received a share certificate confirming her shares in this entity.

[11] The complainant subsequently invested an amount of R72 000, also on advice of the respondent in UG2 Platinum Ltd. Despite the investment reaching its term, the complainant did not receive her capital back. Instead, she was advised to reinvest the capital and the interest at the end of the term, which amounted to R85 427[1].

[12] The complainant agreed to the reinvestment, and same was made in a product called "The FixedGRO Option" (FixedGRO). According to the documentation, the investment would yield a return of 17% after 6 years. It is further noted on the application form that the underlying asset is a UG2 Ltd share.

[13] Around July 2015, it came to the complainant's attention that the first respondent's operating license with the Regulator has been withdrawn. Aggrieved that she was not informed of the aforesaid, the complainant sought to withdraw her investments. Despite many attempts, the complainant has been unsuccessful in recovering her capital.

D. RELIEF SOUGHT

[14] The complainant seeks repayment of her total capital amounting to R123 577[2].

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[1] The investment was split in two when the reinvestment was made – R42 714 in the names of her children

[2] R25 000, R6000, R7150 and R85 427

E. REFERRAL TO RESPONDENT

[15] During October 2015, 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 to this letter has ever been received, despite several requests.

[16] Further correspondence in terms of section 27 (4) was sent to the respondents during September 2016, January 2017 and April 2018. The notices required the respondent to demonstrate compliance with the Code of Conduct, specifically sections 8 (1), 3 (2), 7 (1) (c), and 9. However, the respondent failed to reply.

[17] The Office has received a number of complaints involving the 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

[18] 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.

[19] The issues for determination are:

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

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

19.3 Quantum of such loss.

The investments

[20] Before considering how the financial service was rendered, I deal with the products the complainant invested in.

[21] Investigations conducted into UG2 Platinum Ltd previously[3] by this Office, revealed the following:

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

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

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

[22] The FixedGro structured investment option application form confirms the following:

22.1 That the Silver Seed Structured investment share is a UG2 Ltd share, which is the underlying asset.

22.2 Investment consultants do not earn in excess of 5% commission on structured investments.

22.3 Investment consultants derive more than 30% of their commission from one product.

22.4 The application forms also confirm that Silver Seed may have an interest of 15% or more in the company of which shares are being purchased.

22.5 The repayment of capital and return will depend on the ability of Silver Seed to meets its obligation.

[23] One of the implications of the agreement the complainant signed in respect of the FixedGro investment, is set out in Clause 9, which 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:

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

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".

[24] The complainant could therefore forfeit the entire investment in favour of the product provider, at any point in time.

[25] Enquiries into the Lazaron investment, revealed the following:

25.1 Lazaron approached Silver Seed Capital to assist in raising capital for their start-up venture.

25.2 Silver Seed allegedly made two investment options available to their clients; either investing directly with Lazaron, or via Silver Seed.

25.3 The complainant in this instance completed a form, mandating Silver Seed to acquire the shares on her behalf.

25.4 Since Silver Seed made the purchase, only one share certificate was issued, and it was in the name of Silver Seed Capital.

25.5 Lazaron therefore has no record of any individual that allegedly bought shares in their company.

[26] Having considered the mandate form completed by the complainant in respect of the above investment, the following is noted under the terms and conditions:

26.1 That the signee confirms that they fully understand the risk of private equity investments.

26.2 That Silver Seed does not provide a platform for trading of shares, and will therefore not sell shares on behalf of their clients.

26.3 The application is irrevocable and could only be withdrawn with the consent of Silver Seed Capital.

26.4 A disclaimer under this heading states that Silver Seeds accepts no liability with regards to the acquisition of the shares applied for.

26.5 The applicant further acknowledges that he has made sufficient independent enquiries and has satisfied himself as to the suitability of the investment for himself.

[27] 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.

The FAIS Act and the Code

[28] 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.

[29] 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. However, in contrast with this obligation, the provider attempted to contract out of his duties as prescribed by the Code.

[30] I refer in this regard to the statement contained in the documentation the complainant was required to sign; that the complainant had a duty to make independent enquiries to ensure that the investment is suitable. Such conduct by the respondent is unacceptable, and in contravention of section 8 (1) of the Code, which dictates that a provider must, prior to providing a client with advice;

30.1 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;

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

30.3 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.

[31] There is no evidence that the respondent complied with this section of the Code. One of the documents completed by the complainant, is entitled a "risk profile". None of the information contained in this document provides any detail of the client's financial information, or an indication as to why the investments would be in line with the complainant's means and circumstances. The respondent further did not take time to ensure that his client understood the advice, nor treated her fairly.

[32] Section 3 (1) (c)[4] 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 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. All that the application form provides is that the respondent "may" have an interest of 15% or more in the company.

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[4] 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…'

[33] Further to the aforesaid, a form on file entitled "Securities Transfer form / Agreement of Sale", completed by the complainant after she was advised to reinvest her R72 000, rather seems to suggest that she transferred her shares to Silver Seed Capital. It was therefore by no means a "reinvestment" of funds, but a paper transaction by the respondent in an attempt to further defraud the complainant. The respondent did not act in the best interest of his client.

[34] 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. The statements in paragraph 21 and 22 states amongst others that payment of the capital will depend on the circumstances of the respondents.

G. CAUSATION

[35] 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.

[36] I refer in this regard to the decision of the Appeals Board[5] in the matter of *J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge*[6]. 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

[5] Effective 1 April 2018, the Board is now called the Financial Sector Tribunal

[6] FAB 8/2016, paragraphs 41 – 44

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.

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…..."

[37] 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. I can make no other conclusion than that the complainant's money had been misappropriated.

[38] When the complainant made the investments, 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.

[39] As a result of the respondent's conduct, the complainant lost her capital in the amount of R123 577. The respondent is liable to compensate complainant for her loss.

H. ORDER

[40] 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 R123 577.

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 22nd DAY OF AUGUST 2018

NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS