IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS/05821/13-14/GP 1

In the matter between:

TASHA CRISTELLE DE BEER **COMPLAINANT**

and

SOPHIA ELIZABETH COETZER t/a DOWNSTREAM TRADING **RESPONDENT**

Reconsideration in terms of Section 234(1)(a) of the Financial Sector Regulation Act 9 of 2017 (The FSR Act)

A. INTRODUCTION

[1] On 12 November 2013, this Office received a complaint from the complainant in which she alleged that the respondent had contacted her in February 2011 regarding shares she held in Netcare. The complainant alleged that the respondent advised her to sell her Netcare shares and to buy unlisted shares which she could later sell for a profit. The

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complainant acted on the respondent's advice and received R784 025.60 from the sale of her Netcare shares.

[2] According to the complainant, the respondent assisted her to purchase shares in Unimin and for her assistance with these transactions, charged a high commission that the complainant claims she had not agreed to. The complainant claims that in response to her complaint about the commission charged by the respondent, the respondent gave her shares in Platfields worth R150 000 as a 'payback' of sorts.

[3] During 2012, the complainant contacted the respondent requesting the respondent to assist her sell the shares, in both Unimin and Platfields because she needed the money to buy property. The complainant then learnt that the shares in Unimin had been converted to ordinary shares and could not be sold and that the shares in Platfields were valued at R3 000.

[4] Despite her attempts to contact the respondent, the complainant states that her calls and emails went unanswered. The complainant therefore resolved to lodge a complaint with this Office.

[5] The complaint was forwarded to the respondent and the respondent was afforded multiple opportunities to respond to the allegations in the complaint. In each of these responses, the respondent maintains that that the complainant was aware or should have been aware of the risks associated with the acquisition of the Unimin shares, that the complainant

failed to demonstrate that she had suffered any financial prejudice as a result of the Unimin transaction and that the Platfields transaction did not constitute a sale of shares but was effected as a discount to the complainant. The respondent admits that she provided a service to the complainant but claims that this was only in respect of assisting the complainant receive her shares in Netcare after the respondent had identified that the shares had gone unclaimed. The respondent worked as a tracing agent where she would trace unclaimed dividends and securities.

[6] In return, the respondent would be paid an agreed fee for the tracing services. The respondent claims that the fee she agreed upon with the complainant was 20% of the transaction which amounted to R178 000. The complainant claims that the repsondent however offered the complainant a discount on her services as she and the complainant had become 'quite friendly'. The discount took the form of a transfer of the Platfields shares valued at R150 000 which the respondent had in her share portfolio.

[7] The respondent denies that she rendered financial serves to any of her clients in the course of conducting work as a tracing agent even though she was licensed as a registered financial services provider. The respondent claims that when the financial service was rendered to the complainant, she had not rendered financial services as a registered financial services provider for a number of years. The respondent contends that with respect to the investment in Unimin that the complainant's husband had conducted his own research after the respondent mentioned to him, in an informal setting, that she

was invested in Unimin and knew the director of the company. The 'informal' discussion, according to the respondent, ensued after she (the respondent) enquired from the complainant's husband how the complainant had invested the funds after she sold her shares in Netcare.

[8] This Office investigated the complaint and on conclusion of its investigation issued a determination in which it upheld the complaint in a determination dated 26 March 2019. The respondent was ordered to pay to the complainant an amount equivalent to the value of both the Unimin and Platfields shares. The order was made despite the respondent's claims that there was no evidence of the complainant having suffered financial prejudice because this Office found that there appears to be little to no likelihood that the complainant would be able to recover her capital in respect of both transactions.

[9] The parties were advised that should either of them be aggrieved by the decision, that leave to appeal to the Financial Services Tribunal (the Tribunal) is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

[10] During 2019, the respondent filed an application with the Tribunal for leave to reconsider the determination issued by this Office in March 2019. The application was granted and the matter was heard by the Tribunal on 25 November 2019. The Tribunal issued a decision on 14 January 2020 upholding the application for leave to reconsider the determination. The Tribunal found that the reasons on which the decision to dismiss the

respondent's defence and uphold the complaint, were 'inconclusive'. The Tribunal found that the '*explanations proffered by the applicant regarding the quantum aspect were not addressed*'. The Tribunal thus ordered that the matter be remitted to this Office for reconsideration.

B. RECONSIDERATION

[11] In its order remitting the matter back to this Office for reconsideration, the Tribunal provided that the Office must 'particularly*'* consider the quantum in terms of Section 28(1)(b)(i) of the FAIS Act*.* In particular, to determine to what extent the first respondent suffered losses in respect of the two "investments*".*

[12] In its decision, the Tribunal referred to a judgement issued by the Gauteng Provincial Division of the High Court sitting in Johannesburg. The judgement confirmed a *rule nisi* issued by the Court in September 2015 in which the Court made an order, *inter alia*, '*declaring that all subscriptions to shares pursuant to the 2011 prospectus be set aside*'. The complainant was one of the shareholders who had subscribed to the Unimin shares pursuant to the 2011 prospectus. As such, the complainant was one of the shareholders who, according to the Court's order, should have had the full value of her subscription paid back to her. There were about 41 other such shareholders, some of whom had subscriptions valued at R2 million. The Court ordered Unimin to repay the subscriptions to the applicable shareholders in any manner decided upon between Unimin and each shareholder.

[13] The Tribunal noted that though this Office was aware of the decision by the High Court before the determination was issued, that this Office seemed to not have enquired from the complainant whether she pursued a claim by virtue of the court order. The Tribunal found that it was incumbent upon this Office to have made such an enquiry and that if such an enquiry had been made, that this should have been recorded in the determination. The Tribunal referred to Section 28(1)(b)(i) of the FAIS Act and emphasised that the section provides that a complainant is entitled to '*fair compensation as a result of financial prejudice or damages suffered'.*

[14] The Tribunal found that this Office failed to address the respondents' contentions that, before making any award on the complaint, this Office must first set off the current value of the Platfields and the Unimin shares against the investments made by the complainant. The Tribunal found that this Office failed to indicate on what basis the respondent's contentions regarding the 'investments' were not upheld since reasons regarding the quantum aspect were not addressed.

[15] This reconsideration is undertaken with reference to the above findings and the direction provided by the Tribunal.

[16] The Tribunal did not disturb any of the findings made by this Office with respect to the advice that was rendered to the complainant by the respondent and on which the complainant acted when she acquired the shares in Unimin and in Platfields. The Tribunal

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did not find that this Office erred in finding that the respondent did render advice to the complainant despite the respondent's claims that she did not. The Tribunal also did not overturn the finding that there were a number of provisions of the General Code of Conduct for Authorised Financial Services Providers (General Code) that the respondent violated when rendering the financial service to the complainant.

[17] Since the findings pertain to whether this Office sufficiently considered all the information that was before it prior to making its order, I turn now to consider the order in respect of each investment.

Unimin

[18] The respondent denies that it rendered advice to the complainant and claims that the complainant invested in Unimin after her husband conducted his own research into the company and elected to conclude the investment on the complainant's behalf. According to the respondent, she merely mentioned informally that she was invested in Unimin and only shared the prospectus and the details of Unimin's website with the complainant. The respondent contends that at the time the service was rendered to the complainant she had long ceased working as a financial services provider though she was registered as such and that the service provided to the complainant was only to assist with retrieving her shares.

[19] For reasons which appear in the determination issued on 18 March 2021, the respondent's contentions were rejected by this Office. Though the respondent tried to position the

complainant's decision to purchase shares in Unimin as a decision that the complainant had made independently of her and that she only assisted with the 'administrative' aspects of the work, it was evident that this was not true.

[20] Apart from the findings that appear in paragraphs 13.1 to 13.5 of the determination, there is also the fact that the respondent offers, in her responses, that she referred the complainant to PSG after her mandate ended and then refers to the various documents from PSG as evidence of this. These documents were attached to the response. However, the respondent very conspicuously does not mention that she was involved in the process even though it appears from the documents that she was. From the documents it appears that the respondent prepared them or at least assisted with their preparation.

[21] One of the documents attached to the respondent's response is a document titled 'adviesooreenkoms' which, when translated from Afrikaans, means 'advise agreement'.

[22] Paragraph 1.1 of the agreement states that the goal or objective of the agreement is '*om die klient te help om a goed-ingeligte te kan neem'*. Translated it means that the objective of the agreement is to assist the client make a well-informed decision. It is difficult then to imagine that the respondent would have been involved here in any capacity except as a financial services provider assisting the complainant in an advisory capacity, as envisaged in the FAIS Act.

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[23] Critically, when one considers the prospectus issued by Unimin on 18 March 2011, it appears therefrom that the amount which the directors intended to raise for the business was to be raised by issuing '*shares for cash to private individuals, corporations and institutions*'. Paragraph 5.3 of the prospectus states that '*Those private individuals who have been* ***invited to apply*** *should do so by completing the attached private placement application form in accordance with the provisions of this prospectus and the instructions contained in the private placement application form' (my emphasis)*.

[24] The prospectus sets out clearly that no offer would be made to the general public and only individuals who had been invited to purchase shares for cash would be permitted to do so. Even if the respondent had purchased shares in Unimin, she would have known that the only way the complainant could purchase shares was if she was invited to do so.

[25] It can't be then that the respondent's version is correct because even if the complainant's husband 'had done his own research' into Unimin and expressed an interest in assisting the complainant purchase shares, according to the prospectus, this would be impossible in the absence of an invitation. The likely scenario is that the respondent was the representative through whom the invitation to the complainant to purchase the shares was made. It seems more probable as well that the 'administrative work' which the respondent claims she performed for the complainant, after her husband expressed an interest in purchasing the shares, was in fact her facilitating the purchase on behalf of the complainant. The respondent has already admitted that she knew Unimin's director.

[26] Even so, the respondent questions why the complainant has not pursued a claim in accordance with the order granted by the High Court. The complainant has advised that she did not pursue the claim because of financial constraints and states that the director from Unimin and the respondent advised her and her husband that they will buy and refund the shares. The complainant confirms that she has to date, not received any money from Unimin or the respondent.

[27] The Tribunal found that the order made by this Office did not adequately consider the extent to which the complainant suffered losses in respect of the transactions concluded by the complainant on the respondent's advice. Even though, at the time the determination was issued by this Office, the High Court ordered that the subscriptions be repaid, the date on which the complaint was lodged preceded the date of the judgement. The complaint was lodged even before the first court action, against the respondents in the High Court matter, in 2014. As such, in order for the complainant to exercise any rights in respect of that order, she would first have had to withdraw her complaint from this Office and if not, this Office would have had to dismiss the complaint in accordance with section 27(3)(b)(ii) of the FAIS Act.

[28] Even in the absence of the complainant advising that she was unable to pursue the claim against Unimin because of financial constraints, the order of the High Court did not automatically divest the complainant of her right to seek redress for the losses suffered as

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a result of the advice she received from the respondent. The order of the High Court does not mean that the complainant has not lost the capital used to purchase the Unimin shares and quite importantly did not guarantee shareholders that they would receive the money paid for the subscriptions. This has been dependent on the availability of funds and the complainant's ability to recover their subscriptions.

[29] This Office does not have jurisdiction only where a complainant 'has' suffered financial prejudice or damage but also where they are '**likely** to suffer' financial prejudice or damage and where the provider or representative has acted in a way 'which is **likely** to result in such prejudice or damage' (own emphasis). As at the date the determination was issued, it had been two and a half years since the High Court had issued its judgement confirming the *rule nisi*, and even as the date of this reconsideration, Unimin had made no attempt to repay the complainant's subscriptions. Unimin was/is in possession of all the information pertaining to the shareholders impacted by the judgement, yet, no apparent attempt to contact the complainant in order to facilitate a repayment of her capital had been made. It is clear from the court order that Unimin was ordered to repay the subscriptions. The fact that there was meant to be an agreement between the affected shareholders and Unimin on the manner in which the payment would be made does not change the fact that the responsibility to ensure that payment is made fell on Unimin.

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[30] As such, given the time that has lapsed since the order of the High Court in 2016, the determination in 2019 and now this reconsideration, it seems unlikely that the complainant's subscription will be repaid.

[31] It is trite that in disputes of this nature, the evidentiary burden to prove loss rests on the plaintiff, or for our purposes the complainant. In *Hendricks v President Insurance Co Ltd* 1993 3 SA 158, the Constitutional Court held that:

'*The principle applicable to the assessment of damages has as its ratio the policy that the wrongdoer should not escape liability merely because the damage(s) he caused cannot be quantified readily or accurately. The underlying premise upon which the principle rests is that the victim has, in fact, suffered damage(s) and that the wrongdoer is liable to pay compensation or a solatium*.'[1]

[32] The respondent does not deny that the complainant has suffered loss pursuant to her purchasing shares in Unimin. Unimin was not listed on the JSE and its financial information, as at the date the determination was issued was unknown. The shareholders were advised by the applicant's (in the High Court) attorneys that they should seek legal advice as to how they can go about recovering their subscriptions from Unimin. In the same correspondence, the shareholders were advised that 'enormous costs orders' were granted against Unimin and its directors. The attorneys also advised that the applicants

[1] 1993 3 SA 158 (C) 165E-F.

needed to first determine '*to what extent the assets of the company were not in the meantime dealt with by Unimin and its directors'*. In addition, the High Court ordered, on 12 November 2014, that an independent director who is a senior member of the South African Institute of Chartered Accounts (SAICA) be appointed to attend to the actions listed in the order. The Court ordered that '*the reasonable costs to be incurred, including a reasonable deposit, [by] the independent director in relation to his appointment, report and duties in terms of this order, shall be paid on demand by the First Respondent unless any other order is made by the Court*'.

[33] Evidently, there were expenses already incurred by Unimin and which would still be incurred by it which very likely impacted its financial position.

[34] Unimin was registered with the Companies and Intellectual Properties Commission (CIPC) on 27 September 2010. The prospectus was issued on 18 March 2011 and Unimin Diamonds, in respect of which the prospectus was issued, is described as 'the flagship in the Unimin Group'. Unimin Diamonds had not traded and the funds which were raised from shareholders were intended to enable Unimin to acquire 'small to medium diamond properties and to mine them with minimal capital expenditure'. Unimin had no trading history and relied, as it appears from the prospectus, on the money raised from shareholders.

[35] In light of the above and on application of the principles enunciated by the courts with respect to determining loss as well as on application of the provisions of the FAIS Act, I am satisfied that it is likely that the complainant has 'suffered financial prejudice or damage' as a result of the respondents' actions.

Platfields

[36] It is common cause that the respondent offered the complainant shares in Platfields in lieu of the payment agreement concluded between the parties.

[37] The respondent claims that at the time, the value of the transaction was approximately R1.00 per share thus comprising a value of approximately R150 000. This is however untrue. This Office obtained information from the Johannesburg Stock Exchange (JSE) relating to the value of the Platfields shares. The JSE advised that 'Platfields' listing on the JSE was suspended on 1 July 2013 and the share price at suspension was trading at 2c'. Platfields remained suspended until they were delisted on 21 August 2017. It has been four years since Platfields was delisted and there are no indications that shareholders will be able to recover their investments. From the last published audited results, for the year to February 2014, Platfields showed a loss of R9 million.

[38] As an aside, it bears mentioning that although this Office is not in possession of information relating to the value of the Platfields shares as at 2 February 2011, the JSE advised that as at 11 February 2011, the company's share price closed at 24 cents. This

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means that as at 11 February 2011, only 9 days after the respondent agreed to transfer the shares from her share portfolio to the complainant, the shares were valued at R36 000. Articles published during January 2011, show that price of the shares began declining shortly after listing on the JSE [2]. Respondent must have been aware of this.

C. QUANTUM

[39] Although the complainant states in her complaint that to resolve the complaint she wants 'her R750 000' back, to make that award would be unjustified. It is common cause that the complainant agreed to pay to the respondent 20% of the value of the transaction and that the commission due to the respondent was R178 000. Had the respondent not opted to offer the complainant shares in Platfields, as a 'discount', the complainant would have still parted with R178 000 for commission as agreed prior to concluding the transaction. I find then that the complainant's loss is the R600 000 invested in Unimin.

D. ORDER

[40] In the premise, I make the following order:

1. The complaint is upheld.
2. The respondent is ordered to pay the complainant the amount of R600 000.

[2] https://www.miningmx.com/opinion/columnists/18530-platfields-evokes-caveat-emptor-rule/.

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3. The respondent is ordered to pay to the complainant interest on the R600 000 calculated at a rate of 7.25% per annum, from 4 April 2019 seven (7) days from date of the order dated 26 March 2019 to date of final payment.
4. The complainant must, in writing, undertake to transfer to the respondent any amount received from Unimin in fulfilment of the order issued by the Gauteng Provincial Division of the High Court sitting in Johannesburg.

DATED AT PRETORIA ON THIS THE 1ST DAY OF SEPTEMBER 2022.

ADV NONKU TSHOMBE

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