IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 03378/12-13/ KZN 1

In the matter between:

Dr Robert Alexander Georges De Meulenaere **Complainant**

And

Sophia Elizabeth Coetzer t/a Downstream Trading **Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO 37 OF 2002 (the Act)

A. THE PARTIES

[1] The complainant is Dr Robert Alexander Georges De Meulenaere, an adult male, whose full details are on file in this Office.

[2] The respondent is Sophia Elizabeth Coetzer, a sole proprietor, trading under the name and style of Downstream Trading. The respondent is an authorised financial services provider (FSP) with license number 37791. According to the regulator's records, the respondent's business address is No.19 Van Der Stel Street, Alberante, Alberton, 1450, Gauteng. The license has been active since 19 December 2008.

B. COMPLAINT

[3] The complainant, a 53-year-old radiation oncologist at the time, was during 2011 contacted by the respondent who had notified him that he had a number of unclaimed shares with

Netcare, SANLAM and Old Mutual. The complainant however disputes the respondent's claims that the shares in these entities were either unclaimed or unknown to him.

[4] Nevertheless, a meeting was arranged for 12 December 2011 and based on the respondent's recommendation, the complainant agreed to sell the shares held in Netcare, with the proceeds being used to purchase shares in Unimin African Resources (PTY) Ltd ('Unimin'). The respondent had advised that the investment in Unimin would yield a greater return than that of Netcare.

[5] During the same meeting the complainant had signed a letter of appointment in favour of the respondent as his representative, and after the sale of all the shares in Netcare, which yielded an amount R1 679 404, an investment of R1 300 000 was made into Unimin on 13 April 2012.

[6] The complainant had been under the impression that he was purchasing preference shares and that the shares were listed on the Frankfurt Stock Exchange. The complainant had also been advised that those very preference shares could be exchanged for shares in Global Precious Commodities (GPC)[1] after a period of 12 months.

[7] During July 2014 the complainant requested the return of his funds and it was then that he became aware that Unimin did not even have mining rights and that it only held prospecting rights.

[8] Furthermore, during August 2014, the complainant was informed in correspondence from Unimin that there had been irregularities detected with regards to Unimin's capital

[1] Global Precious Commodities PLC, a private equity firm specializing in investments in medium-sized enterprises that operate in the precious commodities sector, was incorporated on February 7, 2011 and is based in London, United Kingdom with additional offices in Scottsdale, Arizona; London, United Kingdom and Pretoria, South Africa. Global Precious Commodities PLC is no longer in business

structure, and that certain preference shares issued, which included those of the complainant were invalid. The result was that the preference shares, which had all along been ordinary shares, remained as ordinary shares.

[9] The letter also confirmed that GPC was, contrary to undertakings made by the respondent, not only an untradeable security but that is was no longer a going concern. It was also noted that Unimin could as a result of a number of irregularities, the share capital being one of them, not be listed.

[10] The complainant has to date been unable to access his funds and they have for all intents and purposes been lost.

[11] The complainant is of the view that the respondent should be held liable for the losses incurred as a result of her recommendation to invest in a high-risk product without having even conducted a risk analysis. Had it been conducted it would have recorded that he was a risk averse investor who required a guarantee on his capital.

[12] The complainant as a result of the respondent's failure to disclose the true nature of the investment, was unaware of the risks associated with an investment in unlisted shares.

C. RELIEF SOUGHT

[13] The complainant seeks payment of his capital in the amount of R1 300 000. The basis of the complainant's complaint against the respondent is the respondent's failure to render financial services in line with the General Code of Conduct, (the Code) which *inter alia,* enjoins FSPs to render suitable advice and make adequate disclosures when advising clients.

[14] The complainant has agreed to abandon the amount in excess of R800 000 to bring the claim within the jurisdictional limits of this Office.

D. RESPONDENT'S VERSION

[15] The complaint was first directed to the respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office on 24 March 2015.

[16] The respondent replied on 7 May 2015, advising as follows:

16.1 The respondent claims that she conducts the business of a tracing agent in respect of unclaimed securities and dividends under the name and style of Trace Solutions. The respondent claims that she works from leads provided by a database where after having traced the respective individual she would assist with the replacement of share certificates etc. All of this is done in return for an agreed upon percentage of the value of the unclaimed shares.

16.2 It is the respondent's assertion that should the client wish to dispose of the shares the respondent ostensibly refers them to PSG Konsult Financial Planning (PTY) Ltd and her involvement would then cease. The respondent therefore denies, despite being licenced to provide both advice and intermediary service with regards to shares, to in fact having rendered a financial service as contemplated by the FAIS Act.

16.3 The respondent does however admit that in a meeting during March 2012 the topic of Unimin had arisen. Despite her claims that she had advised the complainant that she was unable to advise on such an investment and that he would have to do his own research in this regard, (Note: No documentation has been provided in compliance with the provisions of the Code to support this claim.) she had directed

the complainant to Unimin's website and told the complainant that she would assist in setting up a meeting with the company's CEO.

16.4 The respondent therefore remains firmly of the view that the complainant had conducted his own research into Unimin and that he had as a result fully understood the risks associated with such an investment. In support of these claims the respondent provides a document titled "Information Page and Offer to Purchase". This document is provided under the name of Downstream Trading with the respondents FSB (Now FSCA) licence number clearly displayed. (Note: The document is signed by both the complainant and the respondent, and as detailed below, there is no doubt that the respondent had provided financial services, and specifically advice related services to the complainant with regards to these shares.)

16.5 The above-mentioned document does however not support the respondents claims, as it begins with the following affirmation "...confirm that I have been fully advised regarding the purchasing of shares and the risk of purchasing shares." (Note: Not only does this contradict the respondent's assertions that she had played no material role in the complainant's decision to purchase the Unimin shares, but this document does not record what risks had been disclosed to the complainant, which would allow this Office to in fact determine that the complainant had been "fully advised".)

16.6 The document would appear to be a standard document that can be used for any share transaction and no specific information is provided with regards to the Unimin investment or what was disclosed by the respondent with regards to Unimin. The document for example contains the following phrase "I understand that **certain** (Own emphasis) shares are of a high risk and other shares are of **less** (Own

emphasis) risk and that high-risk shares may have greater returns." Another excerpt from the document records that "I confirm that I have been given information regarding the company and that it **may** (Own emphasis) not be listed on the stock exchange." (Note: Not only is no record provided as to what information was disclosed, but Unimin was definitely not listed, there was only a promise of a future listing, and all the shares were high risk shares as a result of them being unlisted, there were never any low risk shares.)

16.7 The remainder of the respondent's response is focused on specifically addressing numerous allegations raised by the complainant, and she once again denies having made representations to the complainant with regards to the anticipated return of the investment, and that it would generate greater returns than the Netcare shares. The respondent also reiterates her claims that the complainant had knowledge of the risks involved and that he himself had made the decision to invest and that she had made no representations to him with a view to enticing him to invest in Unimin.

16.8 Once again the respondent's claims are not supported by the documentation provided which were appended to her response. In two separate documents titled 'Special Power of Attorney', signed by the complainant on 11 November 2011 and 24 February 2012 respectively, the respondent is cited as the complainant's financial advisor with regards to these funds. A specific line in the document signed on 24 February 2012 reads as follows: (Translated from Afrikaans) "I hereby authorise PSG Online to forward any updates regarding the transaction of my shares directly to my advisor in this regard, Sunet Coetzer."

16.9 The respondent then also makes specific reference to allegations raised in paragraphs 8.3 and 8.3 of the complainant's complaint, which record the following:

- "She said Unimin is a company that is listed on the Frankfurt Stock Exchange.
- That I am purchasing "preference" shares that can be exchanged for Global Precious Commodity ("GPC") shares after a period of 12 months.

The respondent denies having made these claims, stating that this information only came to her knowledge long after the transaction had been finalised. (Note: Regardless of the "he said- she said" nature of these claims, they do in fact represent the respondent's lack of understanding with regards to Unimin and the fact that no due diligence would appear to have been conducted to have justified her making any recommendation in this regard.)

16.10 The respondent ends the response by claiming that the complainant failed to demonstrate that he had suffered any financial prejudice as a result of the Unimin transaction.

[17] On 2 December 2016, a notice in terms of section 27 (4) was sent to the respondent. The notice, *inter alia*, invited the respondent to provide this Office with her case, including supporting documents. The notice further warned the respondent that she is viewed as a respondent and could be held liable in the event the complaint is upheld. The respondent replied to the notice on 15 February 2017 with the essential aspects of the response detailed below:

17.1 The respondent referred to its previous response as detailed above, and no further details were provided in respect of the financial service rendered.

17.2 To its response, the respondent attached a rule nisi indicating that Unimin African Resources Limited (Formally known as Unimin Diamond Limited.) had been

ordered by the High Court in Pretoria to repay the subscription of shares to shareholders.

17.3 According to the respondent, the effect of this order was that:

- All subscription to shares pursuant to the 2011 prospectus were set aside. (Note: This would include the complainant, whose transaction was concluded during 2012, and further highlights the discrepancies inherent in Unimin and the respondent's failure to conduct the required due diligence.)
- That the company had been ordered to repay all such subscriptions.

17.4 The respondent was therefore of the view that the complainant would be refunded in accordance with the court order, and requested that it be provided with the opportunity to engage with the complainant with regards to the court order, or to alternatively explore a settlement on a different basis. (Note: Despite the court order, and the respondent's request to explore alternative settlement arrangements, this matter remains unresolved.)

E. DETERMINATION.

[18] The issues for determination are:

18.1 Whether the respondent rendered financial services at all to the complainant? In the event she did, whether the respondent complied with the FAIS Act and the General Code.

18.2. Whether the respondent's conduct caused the complainant the loss complained of; and

18.3 Quantum of such loss.

Whether the respondent rendered financial services at all and if she did whether the rendering complied with the FAIS Act and the Code.

[19] Section 1 of the Financial Advisory and Intermediary Services Act defines advice as:

"... any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients -

a) in respect of the purchase of any financial product; or

b) in respect of the investment in any financial product; or

c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or

d) on the variation of any term or condition applying to a financial product on the replacement of any such product, or on the termination of any purchase of or investment in any such product, and irrespective of whether or not such advice-

i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or

ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected.

[20] There is no doubt that the actions of the respondent, as detailed above and in documentation provided, resulted in the replacement of the complainant's Netcare shares and the purchase of the Unimin shares by the complainant. As a result, not only did this transaction satisfy the definition of advice, but there is no question that between the complainant and the respondent, there existed a contractual relationship to render financial advice. In discharging these obligations towards the complainant, the respondent was duty bound to observe the FAIS Act and the General Code, (the Code) and align the standard of such service to the Code.

[21] In recommending the investment to the complainant, the respondent breached a number of provisions of the Code such that it would be counterproductive to enumerate all the violations. I set out hereunder, some of the most glaring violations of the Code:

21.1 On the basis of the reasoning set out in this determination, the risks in the investment were not disclosed, thus violating Section 7 (1). The section calls upon providers other than direct marketers to provide "*a reasonable and appropriate general explanation* of *the nature and material terms of the relevant contract* or transaction to a client, *and generally make full and frank disclosure* of any information *that would reasonably be expected to enable the client to make an informed decision*".

21.2 The respondent further violated the Code in terms of section 8 (1) (a) to (c). The respondent has provided no documents to demonstrate that, despite having had access to all the relevant and available information pertaining to the complainant, that the recommendations made were appropriate to the complainant's needs and circumstances.

21.3 Furthermore section 8 (1) (d) of the Code requires that where a financial product is to replace an existing financial product wholly or partially, that the Financial Services Provider must fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement. No documentation exists to indicate that the complainant had been informed as to the implications and consequences of replacing the Netcare shares with shares in Unimin. The failure by the respondent to fully disclose all the material aspects canvassed in this determination would mean that the complainant had not been placed in a position

to make an informed decision. This marks a breach of the Code on the part of the respondent. I am persuaded that had the respondent properly disclosed what this investment was all about and the risk attendant thereto, the complainant would in all likelihood chosen to keep his funds with Netcare.

21.4 In the absence of documentation to the contrary, and with regard to the 'Information Page and Offer to Purchase' document, the representations made to the complainant would appear to have been incorrect and in violation of section 3 (1) (a) (iii) of the Code. Section 3 (1) (a) (iii) requires that that representations to the client must be adequate and appropriate in the circumstances of the particular financial service considering the factually established or reasonably assumed knowledge of the client. It is evident that the representations made by the respondent were not adequate. There is no doubt that had the complainant been made aware of the risks involved in these investments, he would not have invested in Unimin.

21.5 The respondent is also deemed to have contravened section 2 of the Code in having failed to conduct the required due diligence prior to recommending an investment in Unimin. Section 2 of the Code requires 'that a provider must at all times render financial services, honestly, fairly, with due skill, care and diligence, and in the interests of the client and the integrity of the financial services industry'. Not only is there no information regarding the complainant's risk profile, there appears to be no investigation carried out by the respondent into Unimin's financial standing. There is no information about the persons behind Unimin and I could not find a set of audited financial statements nor details about the entity's attitude towards corporate governance.

The respondent appears to have kept information regarding Unimin to herself to the exclusion of her client. It is thus fair to say the respondent had no idea who she was dealing with in recommending an investment in Unimin, and could therefore not have acted in the complainant's interests when she recommended this investment to the complainant.

[22] As a consequence of the numerous breaches of the Code, the respondent committed a breach of her agreement with the complainant in that she failed to provide suitable advice. The respondent must have known that the complainant would rely on her advice as a professional financial services provider in effecting the investment in Unimin.

Whether the respondent's conduct caused the complainant the loss complained of and the quantum of such loss.

[23] The questions that must therefore be answered is whether the respondent's materially flawed advice caused the complainants' 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 respondent advised the complainant to move his funds from Netcare to Unimin. The transaction with Unimin was concluded only after the respondent had approached the complainant with regards to alleged unclaimed shares that the complainant held with Netcare. Without the respondent having intervened, this transaction would never had been concluded. I conclude that the investment in Unimin was the consequence of the respondent's conduct. This makes the respondent's conduct the factual cause of the complainant's loss.

[25] There is sufficient information to demonstrate that the respondent had not been candid with the complainant about the nature of the investment. The respondent has not provided a single detail to demonstrate she had conducted due diligence on the entity involved in the transaction. There is certainly no evidence that the respondent had even seen a set of audited financial statements prior to investing the complainant's funds into Unimin. The respondent's failure to comply with Code was a direct cause of the complainant's loss.

[26] I must now consider whether respondent's conduct was the proximate cause of complainant's loss. When considering legal causation, the primary question is whether the loss was foreseeable when the respondent made the recommendation to complainant. There is sufficient information to demonstrate that the respondent had not been candid with complainant about the nature of the investment. The respondent has not provided a single detail to demonstrate she had conducted due diligence on the entity involved in the transaction. There is certainly no evidence that the respondent had even seen a set of audited financial statements prior to investing complainant's funds into Unimin. The answer must be that it was foreseeable that the risk could materialise. The precise nature of the cause of the collapse did not have to be foreseeable. Respondent's failure to comply with Code was a direct cause of complainant's loss

[27] I now also refer in this regard to the decision of the Appeals Board[2] in the matter of *J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge*[3]. The Board noted the following:

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

3 FAB 8/2016, paragraphs 41 – 44

"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.

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....."

F. QUANTUM

[28] The complainant invested R1 300 000 into Unimin. There appears to be little or no likelihood of the complainant's capital being recovered.

[29] As recorded earlier, the complainant has agreed to forgo the amount in excess of this Office's jurisdiction of R800 000.

[30] I therefore intend to award the complainant the amount of R800 000 plus interest.

G. ORDER

[31] In the premises, the following order is made:

1. The complaint is upheld.

2. The respondent is ordered to pay the complainant the amount of R800 000[4].

3. Interest is to be calculated at a rate of 10%, from a date seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 17th DAY OF SEPTEMBER 2018.

NARESH TULSIE
OMBUD FOR FINANCIAL SERVICES PROVIDERS

[4] Please refer to paragraph 14 in this determination.