

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 01880/15-16/ WC 1

In the matter between

JOHN MULES-BERRY

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. THE PARTIES

[1] The complainant is John Mules-Berry, 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 The first respondent's license was approved on 14 October 2004 and withdrawn by the regulator on 9 September 2014.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 second respondent is Sandro Manuel Azevedo Veloza, an adult male representative and key individual of the first respondent, whose last known address was 78 Bergshoop Estate, Langeberg Road, Durbanville, Western Cape.

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

B. COMPLAINT

[5] On 1 April 2014 the complainant, following advice received from the respondent, invested an amount of R100 000 in a product called “The FixedGRO Structured Investment Option” (FixedGRO). The investment was presented to the complainant as a lumpsum investment that would provide a fixed monthly return of 5% for a period of six months. The complainant was therefore assured of a return of 30% on the capital invested during the six-month period.

[6] The complainant never received the promised rate of interest and upon the expiration of the 6-month term, the complainant was advised to sign various disinvestment forms to affect the sale of the shares to the respondent and recoup his invested capital.

[7] Subsequent to signing the disinvestment forms in October 2014, the complainant received no payment from the respondent.

[8] The complainant visited the offices of the respondent in May 2015, only to find that the respondent had vacated the premises. The complainant subsequently received no further correspondence from the respondent.

C. RELIEF SOUGHT

[9] The complainant seeks repayment of his capital amount of R100 000.

Referral to respondent

[10] During July 2015, the complaint was referred to the respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, 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 to this letter has ever been received.

[11] On the 6th of December 2016, a notice in terms of Section 27 (4) was issued to the respondent, advising it that this Office had accepted the matter for investigation and further requesting the respondent to provide all documents and/or recordings that would support its case. The notice further indicated to the respondent that in the event the complaint was upheld, it could face liability. The respondent failed to submit any response.

D. 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 financial services complied with the provisions of the FAIS Act and the General Code of Conduct, (the Code).

13.2 Whether the respondents conduct caused the complainant's loss.

13.3 Quantum of such loss.

[14] The complainant purchased unlisted shares in UG2 Ltd. Investigations conducted into UG2 Platinum Ltd previously¹ by this Office, revealed the following:

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

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

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

¹ See the matter of Boema v Silver Seeds Capital, FAIS-04229

- [15] 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.
- [16] 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

- [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 General Code of Conduct for Authorised Financial Services Providers and Representatives ('the Code')
- [18] 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 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.
- [19] Furthermore, 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. It is evident from the

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....'*

conduct of the respondents, as detailed above, that it had no intention of complying with this section of the Code.

[20] The respondents sold the investment on the basis that it would pay a return of 5% per month. Nothing was ever mentioned to the complainant about the risk of the investment. It was not explained to the complainant that he was investing in a high-risk venture in which his capital was at risk. There is no indication that the complainant was advised that his entire capital could be lost. The respondent therefore failed to disclose all material aspects of the investment in contravention of section 7(1)(a) of the Code, which provides that concise details of any material aspects of the transaction must be disclosed to the complainant in order for the complainant to be able to make an informed decision.

[21] Furthermore, the respondents have not furnished a single document that demonstrates that the risk involved in this investment was aligned to the complainant's risk profile and capacity. 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, and that it had considered the complainant's financial position, and why the investments were appropriate to the complainant's means and circumstances.

E. CAUSATION

[23] 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.

[24] 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.

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.

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

⁴ FAB 8/2016, paragraphs 41 – 44

In both instances the breach must be the cause of the loss.....”

[25] There is sufficient information to demonstrate that the respondent had not been candid with the complainant about the nature of the investment, in that he was in fact purchasing unlisted shares. Had the respondent explained to the complainant the true nature of the investment, as well as the associated risks, he would not have proceeded.

[26] When the complainant made this investment, he based it solely on the representations made by the respondent. Consequently, as a result of the respondent's failure to observe the Code, (the failure to appropriately advice) the complainant made the investment and ended up with a situation where he lost his capital. The respondents' conduct is the sole cause of the complainant's loss.

[27] As a result of the respondent's conduct, the complainant lost his capital in the amount of R100 000. The respondent is liable to compensate the complainant for his loss.

F. ORDER

[28] 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 to the complainant the amount of R100 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 21th OF FEBRUARY 2019

A handwritten signature in black ink, consisting of several overlapping loops and a long, sweeping tail that ends in a small dot.

NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS