IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 03313/17-18/WC 1

In the matter between

JOHANNES GIDEON VAN ZYL **Complainant**

and

SILVER SEED CAPITAL (PTY) LTD **First Respondent**

SANDRO MANUEL AZEVEDO VELOZA **Second Respondent**

DION CHINNAIAH **Third 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 Johannes Gideon Van Zyl, whose details are on file with this Office.

[2] Th 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. Th first respondent's license was approved on 14 October 2004 and withdrawn by the regulator on 9 September 2014.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 first respondent, whose last known address was 78 Bergshoop Estate, Langeberg Road, Durbanville, Western Cape.

[4] Th third respondent is Dion Chinnaiah, an adult male representative of first respondent whose last known address was 202 Tyger Lake, Niagara Avenue, Tyger Falls, Bellville, Western Cape. At all times material hereto, the third respondent rendered financial services to complainant.

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

B. COMPLAINT

[6] In September 2011 the complainant invested an amount of R100 000 in a product called "The FixedGRO Option" (FixedGRO), following advice from respondent. The investment was presented to the complainant as a product that would be invested for a period of five years with an annual interest rate of 9.5%. The complainant was provided with confirmation that he had purchased UG2 Ltd Shares (more about this later in the determination).

[7] When the investment matured during September 2017, the complainant informed the respondent in e-mail correspondence that he would like to withdraw his investment.

[8] After several attempts to correspond with the respondent via e-mail, the complainant did not receive a response. The complainant concluded that he had had enough and filed the present complaint during July 2017. To date, the complainant has not received his capital back.

C. RELIEF SOUGHT

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

Referral to respondent

[10] During July 2018, the complaint was referred to the respondent in terms of Rule 6 (c) 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 19 September 2018, 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.

Whether respondents violated the FAIS Act and the Code in any way while rendering financial services to complainant.

Failure to disclose costs and conflict of interests.

[14] The complainant purchased unlisted shares in UG2 Ltd. This fact was disclosed to the complainant. One of the selling points was that there were no costs of whatever nature payable from the complainant's investment[1]. However, hidden in the application form is a statement 'that consultants do not earn in excess of 4% commission on structured

[1] This statement was noted on the FixedGRO Comparative Quote document

investments.' Furthermore, the form states that 'investment consultants derive more than 30% of their commission from one product'.

[15] The application form confirms that Silver Seed may have an interest of 15% or more in the company of which shares are being purchased. Following previous investigations[2], this Office was able to verify that the second respondent who is a director of the first respondent, is in fact a director of UG2 Platinum Ltd. The second respondent is noted in the CIPC records as the company secretary of UG2 Platinum Ltd. The respondents were conflicted in this matter and had failed to disclose this to the complainant. The vague statement contained in the application form would not assist the respondents, as it fails to meet the requirements of section 3 (1) (c) of the Code.

[16] The application form also states that repayment of capital and return will depend on the ability of Silver Seed to meet its obligation.

[17] Section 3 (1) (c)[3] of the Code aims to mitigate the far-reaching consequences of conflict of interest. As will be demonstrated below, the respondents disregarded the Code.

[18] The respondents sold the investment on the basis that it would pay a return of 9.5% per annum. Nothing was ever mentioned to the complainant about risk. It was not explained to the complainant that he was investing in a high-risk venture in which his capital was at risk. 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. In the absence of such documents.

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2 See in this regard the matter of KKK Boemah v Silver Seed Capital (Pty) Ltd, FAIS-04229-14/15 NW 1, available on www.faisombud.co.za/determinations

3 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…'

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

19.1 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;

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

19.3 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.

[20] 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.

[21] At the time of making the investment, the complainant was a self-employed viticulturist. He purchased shares from the first respondent prior to 2011. He was thereafter contacted telephonically by the third respondent who suggested that he exercises a "buy back option" on all the shares that he had purchased and re-invest in a "Fixed Growth Option Plus" investment. Following interactions with the third respondent, the complainant withdrew funds that he had accumulated from the sale of his shares. The respondent merely informed the complainant about the 9.5% return per annum but it steered clear of dealing with the risk involved in the product.

[22] The complainant on the other hand was under the impression that he was making a legitimate investment in a safe product. Silver Seed simply solicited investments from

members of the public on the basis of extravagant guaranteed returns. No one knew what happened to their money after paying it into Silver Seed Capital.

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] 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.

[25] I refer in this regard to the decision of the Appeals Board[4] in the matter of *J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge*[5]. 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.

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

5 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….."

[26] 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.

[27] In providing the advice, the respondent knew that the complainant had very limited knowledge of investments and was going to rely on its advice. Indeed, 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 advise) 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.

F. FINDINGS

[28] The respondent failed to inform the complainant that this was a high risk investment where he could in fact lose all his capital. There is also no record as to what happened to the complainant's funds.

[29] From the information before this Office, the respondent failed to comply with sections 2, 3 (1), 8(1) (a-c) and 9 of the Code.

[30] 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.

G. ORDER

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

1. The complaint is upheld.

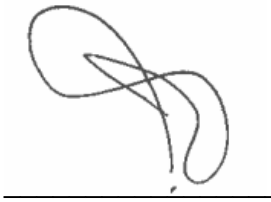
2. The respondents are hereby ordered jointly and severally, the one paying the other to be absolved, to pay to the complainant the amount of R100 000.

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 21st OF JANUARY 2019



NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS