IN THE FINANCIAL SECTOR TRIBUNAL

Case No: A8/2019

In the matter between:

36ONE ASSET MANAGEMENT (PTY) LTD Applicant

and

THE FINANCIAL SECTOR CONDUCT AUTHORITY Respondent

Tribunal: LTC Harms (chair), Adv L Nkosi-Thomas SC and Adv NK Nxumalo

For the Applicant: Adv W H Trengove SC, Adv C McConnachie

For the Respondent: Adv T J Bruinders SC, Adv D Ainslie

Hearing: 29 November 2019

Decision: 20 January 2020

Summary: Reconsideration of decision by The Financial Sector Conduct Authority; contravention of section 65(3) of the Collective Investment Schemes Control Act 45 of 2002; meaning of "solicit" as defined; administrative penalties in terms of section 167(1) of the Financial Sector Regulation Act 9 of 2017.

DECISION

1. This is an application by 36One Asset Management (Pty) Ltd ("36ONE") for reconsideration of (a) a decision taken by the Financial Sector Conduct Authority ("the FSCA") that 36ONE had contravened section 65(3) of the

Collective Investment Schemes Control Act 45 of 2002 *("*CISCA*"),*[1] and (b) an order issued by the FSCA imposing an administrative penalty of R350 000 on 36ONE in terms of section 167(1) of the Financial Sector Regulation Act 9 of 2017 ("the FSRA").

2. The contravention decision and the linked administrative penalty pertain to the publication by 36ONE of information concerning certain unapproved offshore funds in various mediums during the period between August 2015 and March 2018 ("the relevant period"). The publications were made via 36ONE's website, periodic newsletters sent by 36ONE to its clients, and presentations made to its clients. The decision is founded on the FSCA's conclusion that the publications in question constituted "soliciting" investment in those funds.

3. During the relevant period, 36ONE carried on a business of asset management, i.e. performing the functions of a "manager", as defined in section 1 of CISCA, which entails administration of collective investment schemes.

4. The assets under management of 36ONE included unit trusts, local hedge funds and offshore hedge funds. It is common cause that 36ONE did not have the approval of the Registrar of Collective Investment Schemes to solicit, i.e., to promote, investment in its offshore hedge funds. [2]

[1] FSCA decision of 11 April 2019 p13.
[2] Prior to the commencement of the FSRA, the Registrar of Collective Investment Schemes was the "Executive Officer" as defined in Financial Services Board Act 97 of 1990. With effect from the commencement of the FSRA, on 1 April 2018, the functions of the Registrar under CISCA are now performed by the FSCA.

5. The offshore hedge funds in question consisted of two portfolios: 36ONE Hedge Portfolio and 36ONE Offshore Portfolio, both based in the Cayman Islands and listed on the website as “Cayman Islands SPC”.

6. It is also common cause that during the relevant period particulars of those offshore hedge funds were published on 36ONE’s website, the presentations made by 36ONE to its clients, and in its periodic newsletters sent to clients.

7. The issues are whether 36ONE, through publishing the particulars, solicited investments in these foreign collective investment scheme in contravention of section 65(3) of CISCA and, if so, whether the administrative sanction was appropriate.

The applicable legal framework

8. Collective investment schemes are governed by CISCA. It defines the phrase “collective investment scheme” as:

> *“a scheme, in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which—*
>
> *(a) two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest; and*
>
> *(b) the investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined in the deed,*
>
> *but not a collective investment scheme authorised by any other Act”*

9. Associations of persons carrying on the business of collective investments schemes must be licensed to do so in terms of section 26 of CISCA. The collective investments schemes are regulated by:

9.1. the provisions of CISCA,

9.2. its deed (i.e. trust deed, constitution of the association or memorandum of incorporation, as the case may be depending of legal nature of the chosen vehicle); and

9.3. its rules, which must comply with CISCA.

10. A "manager" is defined in section 1 of CISCA as "a person who is authorised in terms of this Act to administer a collective investment scheme". The term "administration" is defined as follows:

> "'*administration' means any function performed in connection with a collective investment scheme including—*
>
> *(a) the management or control of a collective investment scheme;*
>
> *(b) the receipt, payment or investment of money or other assets, including income accruals, in respect of a collective investment scheme;*
>
> *(c) the sale, repurchase, issue or cancellation of a participatory interest in a collective investment scheme and the giving of advice or disclosure of information on any of those matters to investors or potential investors; and*
>
> *(d) the buying and selling of assets or the handing over thereof to a trustee or custodian for safe custody"*

11. Section 5 provides that no person may perform any act or enter into any agreement or transaction for the purpose of administering a collective investment scheme, unless such person;

11.1. is registered as a manager by the registrar or is an authorised agent; or

11.2. is exempted from the provisions of this Act by the registrar by notice on the official web site.

12. Pursuant to the provisions of section 63 of CISCA, hedge funds were declared to be collective investment schemes with effect from 1 April 2015. From that date, hedge funds were therefore regulated by the Act and managers of those funds could solicit investment in those funds subject to its provisions.

13. However, in terms of section 65(1) of CISCA, soliciting of investment in offshore hedge funds may only be done upon approval of such offshore hedge fund by the FSCA. Section 65(3) criminalises soliciting of investment in unapproved offshore investment funds. The section provides as follows:

> *"(1) The registrar may approve an application by the manager or operator of a foreign collective investment scheme to solicit investments in such scheme from members of the public in the Republic if—*
>
> *(a) the application is in the form determined by the registrar;*
>
> *(b) a copy of the approval or registration by the relevant foreign jurisdiction authorising the foreign collective investment scheme to act as such is submitted;*
>
> *(c) the foreign collective investment scheme can comply with the conditions determined by the registrar; and*
>
> *(d) the fee determined by the registrar has been paid.*
>
> *(2) […]*

> *(3) A person who solicits [emphasis added] investments in a foreign collective investment scheme which is not approved in terms of subsection (1) is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment."*

14. Section 1 of CISCA defines *"solicit"* as "*any act to promote investment by members of the public in a collective investment scheme*".

15. In terms of section 58 of the FSRA, the functions of the FSCA include regulating and supervising the conduct of financial institutions. A "collective investment scheme" and a "manager", as defined in CISCA, are financial institutions as defined in section 1 of the FSRA. Section 167(1) of the FSRA provides that:

> *"The responsible authority for a financial sector law may, by order served on a person, impose on the person an appropriate administrative penalty, that must be paid to the financial sector regulator, if the person—*
>
> *(a) has contravened a financial sector law"*

16. In terms of Schedule 1 to the FSRA, CISCA is a financial sector law. Schedule 2 of the FSRA provides that the FSCA is the responsible authority for CISCA. Accordingly, pursuant to its decision that 36ONE had contravened section 65(3) of CISCA, the FSCA was acting in terms of its powers under section 167(1) of the FSRA when it imposed the administrative penalty of R350 000 on 36ONE.

The relevant facts

17. On 28 July 2014, 36ONE appointed Platform 45 Information Solutions (Pty) Ltd to re-design its then existing website and to incorporate the client database

management system into the same system so that the new website and the client database management system would form part of the same system – which system would be “cloud-based”.

18. In the normal course of its business, 36ONE routinely receives multiple data requests from local and international investors and also requests for information from international due diligence specialist firms seeking to conduct due diligences on 36ONE on behalf of potential investors. The information requested by these firms is largely similar and responding to information requests consumes significant operational time.

19. To simplify the process, Platform 45 was instructed to ensure that the website reflected all the funds with which 36ONE was associated, whether as manager or advisor, to reflect a complete overview of the suite of funds with which 36ONE was involved.

20. 36ONE stated that it is in line with international best practice in the asset management industry to provide full and transparent data regarding a firm's product offering when presenting such information to investors. For this reason too, all the portfolios that were offered by 36ONE (approved and unapproved) were published on its website.

21. Regarding the publication of the unapproved funds in the periodic newsletters sent to clients and in the presentations made to clients, 36ONE’s explanation is that these documents contained information about 36ONE drawn directly from the website.

Content of the website, investment process and the website flow

22. The layout of the website was such that the top panel of the home page (and all other pages of the website) contained icons which are linked to the different pages of the website such as "Unit trusts", "Hedge funds", "Invest", "About" and "Contact us". These icons allow browsing between the different pages by simply clicking on the relevant icon.

23. If website users clicked on the "Hedge funds" link, a disclaimer would pop-up on the screen. To the extent relevant, it read as follows:

> *"[…] Hedge funds are presently not regulated by the Financial Services Board, and do not comply with the provisions of the Collective Investment Schemes Control Act 45 of 2002. Therefore hedge funds are private investments, suitable only for sophisticated investors, and are not open to the general public.*
>
> *The information and documentation presented on this site do not constitute a solicitation, invitation or Investment recommendation, and prior to selecting a financial product or fund it is recommended that investors seek specialised financial, legal and tax advice. The laws of the Republic of South Africa shall govern any claim relating to or arising from the contents of this site."*

24. At the end of the disclaimer was an icon labelled "Agree and continue" which had to be clicked before proceeding to the next page. Once the "Agree and continue" icon was clicked, it led to the hedge funds page. On the hedge funds page, four different hedge funds were listed in a tabular format under two main columns: "Hedge Funds (ZAR)" and "Hedge Funds (USD)". Under each of these two main columns were two sub-columns with a summary of fund-specific information such as fund name, description as "FSB regulated" or "Cayman Island SPC", risk profile, investment policy, liquidity, etc. Under each

sub-column was another link labelled “Read more”, which if clicked led to a page devoted to providing more detailed information on the relevant fund.

25. On the fund-specific page, the website user would be given more detailed information about the particular portfolio. At the end of that information, there was an icon labelled “Invest”. If the “Invest” icon was clicked in respect of the approved funds, the website user would be taken to a page which detailed the process to invest and which provided the subscription forms enabling them to apply for investment.

26. However, if the “Invest” icon was clicked in respect of unapproved funds the website user would be required to complete their details to enable 36ONE to contact them. No details were provided on the website as to how to invest and subscription forms were not made available online.

The meaning of “solicit”

27. As stated above, the only issue in dispute is whether the publication of information of the unapproved offshore investment funds on the website, in the periodic newsletters sent to clients and in presentations made to clients constituted soliciting of investment in a foreign collective investment scheme which is not approved. This issue turns on the proper meaning of the term “solicit” as used in sec 65(3) and defined in sec 1 of CISCA namely as “any act to promote investment by members of the public in a collective investment scheme”.

28. 36ONE contended that the word “solicit” in section 65(3) means an “intentional and earnest request to the public to invest”. It says the publications in question

amount to mere publication of information, and mere publication of information does not constitute "soliciting". To constitute "soliciting", publication of information must be done with the intent to promote investment or with the purpose of promoting investment in those funds. It was argued that 36ONE had no intention to promote investment in the unapproved offshore hedge funds by members of the South African public but the offshore hedge funds were included in the publications only for informational purposes and for transparency.

29. It may be accepted that, for purposes of section 65(3), the act of promoting an investment in an offshore hedge fund requires the intent to promote, and that an innocent promotion may not be struck by the prohibition. That leads to two discrete enquiries. The first is whether the website and other information promoted the products it mentions and, secondly, what was the subjective intention of 36ONE in providing the information on the website.

30. 36ONE contends that the website did not solicit investment in the unapproved funds because the website flow, described above, evidences 36ONE's clear intention to only permit investment via the website into the approved funds, not into the unapproved offshore hedge funds. Accordingly, so the argument goes, website users were never able to invest in offshore hedge funds "at the click of a button".

31. That misses the point. The website promoted investment in the local products of 36ONE. That much was accepted by 36One, during argument. The only difference between local and offshore hedge funds was that the user of the

website could not complete the offshore investment online. That person was invited to explore such an investment.

32. In support of its submission that the website did not promote offshore products, 36ONE relied on the fact that no South African investor invested in the offshore funds by virtue of having seen them in any of the three mediums through which they were published. Since 1 April 2015, only one new South African investor made an investment in the *36ONE Hedge Portfolio* and no new South African investors invested in the *36ONE Offshore Portfolio*.

33. The fact that a promotion was ineffective does not mean that the act was not one of promotion. It is the act which is prohibited, irrespective of success.

34. Reliance is also placed on the evidence of 36ONE that it did not intend to promote but that it intended to provide information to the market. But as will be indicated, that is simply untrue. The submission in any event fails to distinguish between motive and intent. The motive might have been to give the market information but one of the purposes of giving that information was to promote its business.

35. It is a settled principle of our law of evidence that a fact finder is not bound to accept the uncontradicted evidence. In *McDonald v Young*,[3] the Supreme Court of Appeal said:

> *"[5] It was contended, on behalf of the appellant, that the high court had erred in failing to accept and rely on the appellant's evidence regarding the agreement, having particular regard to the fact that his evidence*

[3] 2012 (3) SA 1 (SCA).

was unchallenged. It was further contended that the respondent's failure to testify was fatal to her case and that this court was obliged to accept his unchallenged evidence in respect of both the agreement and the claim for maintenance.

[6] It is settled that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus. In Kentz (Pty) Ltd v Power, Cloete J undertook a careful review of relevant cases where this principle was endorsed and applied. The learned judge pointed out that the most succinct statement of the law in this regard is to be found in Siffman v Kriel, where Innes CJ said:

> *'It does not follow, because evidence is uncontradicted, that therefore it is true. . . . The story told by the person on whom the onus rests may be so improbable as not to discharge it.'*

[7] It is thus necessary to consider the appellant's evidence in detail."

36. The purpose of publication of investment funds in its portfolio by a company, whose business entails administration of those investment funds, can hardly exclude the marketing of those funds. It may not be the sole purpose for publication but marketing or soliciting investment in those funds would definitely be amongst the purposes. Accordingly, 36ONE's evidence that its publication of the unapproved funds was not intended to solicit investment in those funds is inconsistent with the wider probabilities. It overlooks the objective fact that the core business of 36ONE is the administration of those funds, not facilitation of due diligence inquiries or transparency – those are merely incidental to its core business.

37. The only difference between the publication on the website of the approved funds in which investment was undeniably being solicited and the unapproved funds was that (1) there was a disclaimer in respect of unapproved funds that the publication did not constitute solicitation of investment and (2) that, unlike the approved funds in respect of which the website provided investment procedure and subscription forms to apply for investment, the website merely provided an prospective investor with a form to complete their details for 36ONE to contact them.

38. The disclaimer was in this regard disingenuous. It recognised that solicitation was not allowed but then proceeded to provide a button which invited the user to contact 36One in connection with the product.

39. The fact that the disclaimer states that the information published in respect of the unapproved offshore funds reveals that 36ONE was conscious of the soliciting effect of that publication but sought to undo it by a disclaimer. Labelling a cat “dog” does not turn it into a dog.

40. The difference in investment procedure relates to a stage after the website user has read the information, after his interest to invest has been aroused and after he has already decided to click on “invest”. In other words, the point of solicitation is before they decide to click the “invest” icon, the difference in procedure after clicking the “Invest” icon is irrelevant. The decision whether or not to click the “Invest” icon is merely the outcome of solicitation and by then solicitation has already happened – whether successful or unsuccessful. As long as the publication of the information has the effect of promoting the

product or arousing an interest in investing in the product it amounts to soliciting.

41. This meaning is business-like as contemplated in *Endumeni*.[4] The fact that a picture published in a newspaper depicting apparently successful and good looking people drinking an alcoholic drink has a disclaimer that "*alcohol abuse is dangerous to your health*" does not make it any less of an advertisement of that alcoholic drink than when that disclaimer was omitted. Similarly, the fact that the label of that alcoholic drink contains a disclaimer that "*not for sale to persons under 18*" does not make the advertisement less appealing to persons under 18 years of age. Accordingly, similarities in the nature of information published, manner of publication and effect of the published information in respect of the approved and the unapproved funds makes it difficult to distinguish between the two merely because of the disclaimer or the procedure followed after the fact.

42. There is another objective fact that is inconsistent with the stated purpose of the publication excluding the intent to promote or solicit investment, i.e. the publication of unapproved funds in client newsletters and presentations. Facilitation of due diligences and transparency do not apply to the publication of unapproved funds in 36ONE's periodic newsletters and presentations. The explanation that the information published in the newsletters and presentations was pulled directly from the website is improbable. For example, the nature of information contained in the newsletter under "Market

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras [18] – [19], recently endorsed in the unanimous judgment of the Constitutional Court in *Moyo and Another v Minister of Police and Others* [2019] ZACC 40 at paras [51] – [55].

overview" analysing the current political and economic climate and making reference to present-day events such as the election of President Ramaphosa[5] shows that these documents are prepared manually taking into account the current events as at the date of publication. Accordingly, these documents are not automated reports generated at a click of a button using the data pulled from the website.

43. On this basis, the evidence of 36ONE that the publications were not intended to market the unapproved or to promote or solicit investment in them is rejected as improbable.

44. With regard to the quantum of the administrative penalty, it was contended that because no investment actually materialised from the relevant publications no penalty should have been imposed.

45. The main objective of CISCA read with those of the FSRA is to deter the financial institutions from contravening the financial sector laws. The significance of the risk posed by soliciting investment in unapproved or unregulated funds cannot be over-emphasised in a society like ours. Accordingly, when considering an appropriate administrative penalty for contravention of a financial sector law by a financial institution, a penalty that strikes a balance between effective deterrence from contravention of financial sector laws and unreasonably harsh penalties must be sought.

46. In the context of a fund manager that manages assets worth over R14 billion, as at the relevant period, we do not consider the administrative penalty of

[5] See the "Market Overview" on page 28 of the record.

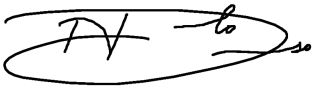
R350 000 to be inappropriate. Accordingly, the application for reconsideration is dismissed.

47. Consequently, the following order is made:

47.1. The application for reconsideration is dismissed;

47.2. Each party to pay its own costs.

Signed on behalf of the Tribunal on 20 January 2020



Adv NK Nxumalo
(Tribunal member)