IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 03161/09-10/GP 1

In the matter between:-

THEODORE EDWIN HILL	**Complainant**
and	
BULLS EYE FINANCIAL CONSULTANTS (PTY) LTD	**1st Respondent**
CRAIG SHELLEY	**2nd Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')

A. THE PARTIES

[1] Complainant is Theodore Edwin Hill, a male retiree of Renaissance, Glenvista, Gauteng Province. The complainant is also representing his wife, Lorraine Hill. They are married in community of property.

[2] First Respondent is Bulls Eye Financial Consultants (PTY) Ltd, a company duly incorporated in terms of the company laws of South Africa with its principal place of business at 56 Coral Tree Crescent, Fourways Gardens, Fourways, Gauteng Province. First respondent is an authorised financial services provider with license number 34702. The license was issued on 12 March 2008.

[3] Second Respondent is Craig Shelley, a male of adult age, an authorised representative and key individual of 1st respondent. At all times material hereto, complainant dealt with Colin Jamieson, (Jamieson) a representative of the 1st respondent. For convenience, I refer to 1st and 2nd respondents collectively as respondent.

B. COMPLAINT

[4] During 2007 whilst acting on the advice of respondent, complainant and his wife, aged 66 and 65 respectively at the time, invested an amount of R600 000 into an investment scheme known as Spitskop Village Properties Ltd. The investment was promoted by Blue Zone, a property syndication group. The amount was invested as two separate transactions of R300 000 each on 5 September 2007.

[5] Thereafter complainant and his wife received income until August 2009 where after it ceased. Upon enquiring from Blue Zone about the income, he was furnished the contact details of the liquidators who advised him that he stood to lose about 80% of his capital.

[6] Complainant had been retrenched years earlier and the monies were the proceeds of his pension fund that had been paid out. This combined with what return could be added thereto were the funds upon which complainant depended upon to see him through retirement.

[7] Whilst employed at the time of the investment he was unsure of his tenure and reaching an age at which future employment was unlikely. In his own words defendant was heavily dependent on this capital.

[8] The complainant has asked for the payment of the amount of R600 000.00 together with interest.

C. RESPONDENTS VERSION

[9] On 15 December 2009, the complaint was referred to respondent in terms of rule 6 of the Rules on Proceedings, (the Rules). The letter from this Office called for:-

a) A statement detailing how the investment was concluded;

b) The basis for recommending the BlueZone investment;

c) Documentation evidencing that a risk profile was done;

d) An explanation as to the respondent's authority for marketing the product which is made up of unlisted shares and debentures, considering the limits of its license;

e) A copy of the record of advice in terms of section 9 to indicate the products considered and the basis for concluding that the Bluezone investment was likely to address the complainant's needs;

f) Any other material in respondent's possession that would support its case.

[10] Respondent's version is contained in three letters, dated 23 February 2010, 4 March 2010 and one that was undated. All three letters were signed by Jamieson.

[11] According to Jamieson, he and complainant had a long standing relationship; as evidenced by a computer needs analysis dated July 2004 that was submitted by respondent. The matter at question arose during August 2007, when complainant informed him that his investment with Sharemax[1] was to be liquidated and requested Jamieson to find a similar investment for him.

[12] Jamieson first consulted with complainant about Blue Zone on the 29th August 2007, when he was given the prospectus. On both this and previous occasions they discussed the traditional lump sum investments offered by banks and life assurance companies; however these offered either monthly income or capital growth but not both, in addition to which the income rates were 2% to 2.5% lower than those offered by Blue Zone.

[13] It is also respondent's version that Blue Zone fitted complainant's risk profile of 'moderately aggressive'. At the time, Blue Zone in his view was rather

[1] According to Jamieson, the investment in Sharemax dates back to 2004.

'moderate than moderately aggressive', as they offered only slightly higher returns than conventional investments'.

[14] Jamieson confirms that whilst complainant was employed he was concerned about security of tenure and had raised the possibility of having to find alternative employment and if so the need for income during the hiatus between jobs.

[15] According to Jamieson, 'after considering his needs at the time a decision was made to invest in Bluezone'.

[16] A key part of Jamieson's version/ respondent's defence is that Jamieson considered himself a 'spotter' for Bluezone and not a 'broker consultant'. In this regard Jamieson makes mention of a Mr Alan Stewart (Broker Consultant-Bluezone) not being able to attend the meeting with complainant on the 29th August 2007, but the next day Mr Stewart phoned and asked if he could contact the client directly. Mr Jamieson stated that he believed that he had done so given that Mr Stewart had asked for directions.[2]

[17] Additionally the letter from Jamieson dated 4th March 2010 and referred to in paragraph10 purports to detail the outcome of a meeting held at the complainant's home on 2 March 2010. In the letter, Jamieson states that during the meeting, complainant accepted that Stewart of Bluezone presented and discussed the Spitskop Village investment with him in August 2007. He mentions that he advised the complainant to direct his complaint to Stewart

[2]Complainant denies having met with separately with Mr Stewart

and not him. At that meeting, complainant requested a copy of the Bluezone application form and contact details of Stewart.

D. DETERMINATION AND REASONS

[18] There are three issues here:-

a) Whether respondent rendered financial services to the complainant;

b) If indeed it did so, whether in so doing it complied with the FAIS Act and the Code;

c) In the event it is found that the respondent failed to comply with the Code, whether such conduct caused the damage complained of.

[19] As already mentioned respondent places great store on the fact that it merely acted as a spotter and not a 'broker consultant' and therefore by implication did not require compliance with the requirements of the FAIS Act. Yet despite having acted as complainant's adviser since 2004, respondent's own documentation does not evidence that this supposed change in roles was conveyed to complainant.

[20] We have the letter of the 4th March 2010 wherein respondent/Jamieson contends that complainant in a meeting of the 2nd March 2010 accepted that Jamieson acted as a spotter, yet the very fact that respondent is attempting to lay the groundwork for this defence by relying on a recent letter, in of itself points to the fact that this was never an issue that was discussed with complainant at inception.

[21] Additionally complainant denies that he accepted this version. He states that whilst this was put forward at this meeting, in his opinion Mr Jamieson was his financial adviser, and the person whose recommendations he took note of.

[22] There is no documentary evidence that respondent's role as spotter was conveyed to complainant. The solitary place which refers to a spotter, with Jamieson's name next to it is contained within the commission section of what is almost certainly an internal administrative document. Respondent has offered no evidence confirming that his role of a spotter was ever conveyed to complainant or that he explained the difference in roles.

[23] Additionally where the commission percentages are contained therein they do not align with the General Code requirement in section 3.(1) (vii) that where reasonably pre-determinable, representations made to a client by a provider 'must, as regards all amounts, sums, values, charges, fees remuneration or monetary obligations mentioned or referred to therein… be reflected in specific monetary terms.' The very nature of this transaction would have easily allowed respondent to ascertain this monetary amount, yet I note that there is not even space on this section to allow for compliance, further pointing to this being an internal document. Notwithstanding this there is no other document that evidences complies with section 3.(1) (vii) which is a clear violation of the general code. It is both his right and a requirement of the General Code that complainant be properly informed as to the charges that were levied by respondent.

[24] What strikes me about this lack of disclosure is that whilst Jamieson is referred to as a 'Spotter' he receives by far the lion's share of the commission.

Whilst Mr Stewart who was referred to in paragraph 16 receives nothing, Jamieson receives 5 % out of a total of 9% distributed amongst various individuals/entities. This can only mean one thing and that is that the role that Jamieson played within the transaction was significant. In short more in accordance with his traditional role as the financial adviser. Additionally the very high overall commission should immediately have raised alarm bells as to just how this amount was going to be recovered, which in itself perhaps explains why the commission was not disclosed to complainant.

[25] The inescapable fact remains that it was Jamieson in his capacity as a financial adviser acting on behalf of respondent that introduced complainant to Bluezone. In fact not only did he introduce him but he was present every step of the way as indicated by his signature as witness on the application documentation. This accords with the historical relationship between the parties.

[26] Had Jamieson wished to alter his role then this should have been done in manner that was unequivocal; thereby allowing complainant to understand the relationship of the parties and make an informed decision. Section 5 (b) demands that a provider rendering financial services to clients furnish to the client at the earliest reasonable opportunity, concise details of the legal and contractual status of the provider, including the relevant product supplier, in such a manner that the client is clear which entity accepts responsibility for the actions of the provider or representative in the rendering of financial services and the extent to which the client will have to accept such responsibility. Even on respondent's version there was a relationship with the provider as a spotter and yet neither of these sections were complied with.

[27] Jamieson himself, in fact gives the lie to respondent's version when in the undated letter, and in his own words states 'after considering his needs at the time a decision was made to invest in Bluezone'.This falls squarely within the definition of 'advice' as defined within section 1 of the FAIS Act namely 'any recommendation, guidance or proposal of a financial nature furnished by any means or medium,'

[28] I could not agree more with complainant who in a letter of the 10th March 2010 points out that Jamieson having been paid a commission is now trying to distance himself from his responsibilities.

[29] Having determined that respondent rendered a financial service to complainant, the question is whether such service was performed in accordance with the FAIS Act.

[30] In terms of section 7 (1) of the FAIS Act a person may not act or offer to act as a financial services provider unless such person has been issued with a license under section 8. Failure to comply therewith is an offence in term of section 36 of the FAIS Act. Bluezone had a category 1.8 licence. They actually required a category 1.10 to market debentures. Respondent was in the same position in that it was neither qualified nor capable of rendering advice in respect of either shares or debentures.

[31] Evidence of this lack of understanding is contained in the undated letter from Jamieson wherein he states that 'Bluezone investments were in my view rather moderate than moderately aggressive as they offered only slightly higher returns than conventional investments.' This ignores the fact that Bluezone was an unlisted entity with no track record; its only asset being a

piece of land which it had purchased from its sister company for R1 057 000.00, upon which it intended to raise 425 million rand. In simple terms there were no assets which provided any meaningful security to investors.

[32] These risk factors were magnified when one considers that the majority of complainant's life savings were being placed into one basket and an untested and questionable unlisted entity at that. Had respondent bothered to consider how Bluezone intended to pay the monthly income given that it had no income producing assets, the risk would have been strikingly apparent and led respondent to a different conclusion as to risk.

[33] As laid out in Dudley and Leisure Financial Services CC case number FOC 04114/08/09/WC there was a duty on respondent to conduct a check on Bluezone and its related entities. Had the most basic of due diligences been conducted it would have been apparent that that apart from not being approved this was a very high risk venture indeed. As part of the general duty of a provider as contained in section 2 of the General Code a provider is required to render financial services with 'due skill, care and diligence'; regrettably in this instance Jamieson had neither the qualifications nor the skill to appreciate the risk to which he was exposing his client. In consequence he could not have placed his client in a position to make an informed decision, a requirement of section 8. (2) of the General Code.

[34] As for respondent's version that complainant had a moderately aggressive risk profile; whilst complainant did indeed score within a moderately aggressive category on his risk profile this fails to take into account not only

that complainant's wife fell within a moderate category but that a risk analysis form must be viewed in the context of the appropriate and available information that has been sought from client[3]. Far more important was the overriding consideration that though perhaps insufficient, this was essentially complainant's sole means of providing for retirement.

[35] That it may not have been enough was all the more reason not to take any unnecessary chances. It is not an adviser's role to take unnecessary risks with client's money in an attempt to make up for a lack of saving; for by doing so he does both himself and his client a disservice.

[36] Respondent has made the point that the complainant was not unfamiliar with investments in property syndications. This, he bases on the fact that complainant had invested in Sharemax since 2004. Respondent cannot derelict his duties as a provider and hide behind the claim that complainant was not unfamiliar with property syndications. First, he provides no record of their discussions to demonstrate how knowledgeable complainant was in this type of investment. In fact, it is difficult to see how respondent's point can be sustained given his own lack of understanding of the product.

[37] I now turn to the requirements of Government Notice No.459, Government Gazette 28690, which was issued on 30 March 2006. Annexure A attached thereto, contains what is described as minimum information to be contained in a property syndication disclosure document.

[3]Section 8. (1) (a) of the FAIS Act

[38] Annexure A provides in section 5 inter alia that full details shall be given of the financial year end; the shares to be issued; the shares to be issued in future; control over unissued shares; shareholders' loans and or debentures; a pro-forma balance sheet on acquisition (in the case of new developments, on completion); the income distribution plan; minimum and maximum shareholders/participation quota; any special voting rights, gearing, existing and or planned; borrowing powers and how they are to be exercised. Respondent provided nothing of this sort.

[39] It is doubtful whether respondent understood what gearing powers the directors of the entities involved had and what this means in terms of risk to investors. He had no idea how much say investors had in terms of how the affairs of the entities were run. He had no idea what corporate governance arrangements were in place, nevertheless he went ahead, advising complainant that the investment was appropriate.

[40] Perhaps particularly relevant is that requirement that there be a statement setting out the cost of the property to the promoter or the syndication company including acquisition price, cost of renovations, conversion or enhancement including details of any new leases or lease renegotiations which enhance value, marketing and promotional cost fees and the promoter's entrepreneurial mark up, giving rise to the shareholding offer price in the company as at the offer date.

[41] There are many other additional requirements, but the preceding paragraphs give some insight into the prescribed minimum information that ought to have been canvassed with complainant as an investor who intended to invest in a

public property syndication. Although the disclosures are to be made by the promoter of the public property syndication, they are critical for providers advising clients about risk pertaining to this type of investment. It goes without saying that providers who recommend this type of investment to investors but fail to advise their clients about the important issues mentioned in the gazette are simply exposing themselves to liability for failing to advise their clients appropriately.

E. FINDINGS

[42] I am satisfied that respondent failed in his duty to comply with section 8 (1) (c) and 9 of the Code whilst rendering financial services to complainant. He produced no record to demonstrate the products considered. Based on his version, he compared in his mind some products (known only to himself) with the Bluezone product only on the basis of the rate of income and capital growth. The act of comparing financial products only on the basis of a return is frowned upon by the Code in that is likely to lead to the client making an uninformed decision. This is the point in case with complainant.

[43] Respondent further failed to disclose the material aspect of risk inherent in the Bluezone product. His contention that complainant was not unfamiliar with property syndications does not assist him. On the contrary, the facts would lead any fair minded person to conclude that complainant was depended on respondent's advice. Respondent exploited that dependency by recommending a product with high risk and failed to disclose such.

[44] Respondent's insistence that he was regarded as a spotter and therefore did not render financial services is not sustainable and must be rejected.

[45] Respondent also failed to make accurate disclosures to complainant as required by the Code regarding how the return was to be paid. Even though there was no building he did not question where the return was going to come from in order to understand the viability of the investment and to appropriately advise complainant.

[46] Respondent failed to disclose costs including his commission.

[47] There is no question that respondent's inappropriate advice, in contravention of the General Code, directly led to complainant suffering financial damage.

F. QUANTUM

[48] Complainant invested R600 000 in Bluezone. Complainant has also not been paid any income since August 2009. It is now April 2012. All of this supports complainant's contention that he has lost his capital of R600 000.00. I intend therefore to make an order in the amount of R600 000.00 in this regard.

G. ACCOUNTABILITY

[49] I deem it appropriate that I deal with the issue of joint and several liability of the respondents herein. I have held that the 2nd respondent failed to comply

with the Code in the rendering of the financial service herein. 2nd Respondent is a member and key individual of 1st respondent. If I were to hold 1st respondent solely liable this would not be in line with what the legislature intended as evidenced by section 8 of the FAIS Act. I say so for the following reasons:-

(a) In terms of section 8 (1) (c) of the FAIS Act in instances where a financial services provider is, amongst others a corporate body, the applicant for licensing must satisfy the registrar that any key individual in respect of such applicant complies with the requirements of personal character qualities of honesty and integrity; and competence and operational ability'. It is only when the registrar is satisfied that that an applicant meets these requirements that a license will be granted.

(b) Additionally 'no such person may be permitted to take part in the conduct or management or oversight of a licensee's business in relation to the rendering of financial services unless such person has on application been approved by the registrar.

(c) Section 8 (5)(ii) additionally requires that upon the change in the personal circumstances of a key individual a registrar may impose new conditions on the licensee. From the obligations imposed on the key individual it is clear that it is the key individual himself that is personally responsible to satisfy the registrar that he is fit and proper. Authorisation of the entity is approved through the key individual himself.

(d) The fact that where the key individual does not meet the legislative requirements of fit and proper, the corporate entity's license can be

withdrawn simply means the intention of the legislature is to hold both persons accountable. The General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code) clearly envisages that the general and specific duties of a provider of financial services are those that are performed by a natural person as opposed to an artificial persona. This is evident in:-

(i) the definition of provider includes a representative;

(ii) the general duty of a provider in Section 2 of the Code requires that financial services be rendered with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry. This can only be performed by a natural person;

(iii) The various specific duties regarding the rendering of a financial service set out in section 3 require human intervention;

(i) So too all the requirements set out in Parts III, IV, V and VI.

1st Respondent is the licensed provider under whose name the financial service was rendered. 2ndRespondent is a key individual of 1st respondent. Therefore, it is necessary that I hold both respondents liable jointly and severally, the one paying the other to be absolved.

THE ORDER

In the premises the following order is made:

1. The complaint is upheld;

2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R600 000,00, made up as follows:

2.1 R300 000,00 in respect of the investment made by Mrs L Hill;

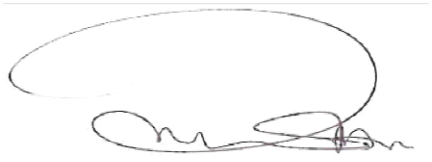
2.2 R300 000,00 in respect of the investment made by Mr TE Hill.

3. Complainant is to hand over, upon full payment, all documents and securities, forgo any rights or interest pertaining to the investment in favour of respondents;

4. Interest at the rate of 15.5 % , from a date seven (7) days from date of this order to date of final payment;

5. Respondents are to pay a case fee of R 1000, 00 to this office within 30 days of date of this order.

DATED AT PRETORIA ON THIS THE 14th OF MAY 2012.



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