

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 01799/10-11/WC1

FAIS 02216/10-11/WC1

In the matter between:-

WARRICK PORT

1ST Complainant

GERALD PORT

2ND Complainant

and

FUGIO FINANCIAL SERVICES (PTY) LTD

1ST Respondent

JACOBUS STEPHANUS GELDENHUIS

2ND Respondent

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

A. PARTIES

- [1] First Complainant is Warrick Port, an adult male South African, currently residing in Dubai, United Arab Emirates.
- [2] Second complainant is Gerald Port, an adult male South African, residing in Dubai, United Arab Emirates.

- [3] First respondent is Fugio Financial Services (Pty) Ltd (registration number 1999/019272/07); a company duly incorporated in terms of South African law, with its principal place of business at 14 Platberg Ave, Van Riebeeck Park, Kempton Park 1619. At all material times, 1st respondent was an authorised financial services provider in terms of the FAIS Act, with license number 15644. This license was suspended on 05 July 2010.
- [4] Second respondent is Jacobus Stephanus Geldenhuis, an adult male, a key individual and authorised representative of the 1st respondent at the time the financial services were rendered. For the purposes of convenience, and where appropriate, I refer to 1st and 2nd respondents collectively as respondent.
- [5] These are two separate complaints but I deal with them at the same time as the facts in each are essentially the same.

B. BACKGROUND

- [6] A long standing relationship existed between the complainants and the respondent. The respondent is described by the complainants as a close friend to them and their parents. The complainants have been living and working in Dubai for the past 9 years. Being out of the country, they entrusted the respondent with investing some of their funds.

C. THE COMPLAINTS

[7] The complainants' complaints may be summarised as follows:

First complaint

7.1 According to 1st complainant, the respondent contacted him in August 2007 and advised him that he should utilise R1200 000 of an existing investment and invest it in an endowment policy with Momentum ('the endowment'). First complainant asserts that apart from being assured by the respondent that his advice was good, nothing more was disclosed to him. Being respondent's client and friend for many years and having built a relationship based on trust 1st complainant agreed to the endowment.

7.2 First complainant believed that the investment term of the endowment would be five years 'as this is the norm'. However, upon receiving the investment agreement, he learnt that the term was in fact ten years. Although upset about the investment's ten year term, 1st complainant was content when respondent informed him that the endowment could be sold as a second hand policy after a period of five years.

7.3 Approximately one year after the investment was made, the 1st complainant noticed that a further R1200 000 had been transferred from one of his investments. Upon enquiring from respondent, 1st complainant was informed that the funds were transferred to the

endowment as the annual **recurring premiums** are payable for a term of ten years.

- 7.4 First complainant submits that the respondent was fully aware of his circumstances. He is a construction worker and is not permanently employed. He would never have agreed to the investment as he could never have afforded to pay a premium of R1200 000 per annum for a period of ten years.

Second complaint

- 7.5 Second complainant states that he accumulated \$700 000 over a period of seven years whilst working abroad. The money was held in an offshore bank account. In early August 2007, 2nd complainant instructed the respondent to invest \$400 000 of the \$700 000 directly offshore. The balance of \$300 000 was to be repatriated and invested in South Africa.¹
- 7.6 According to 2nd complainant, he made it clear to the respondent that he did not want to invest for more than five years. Second complainant's thinking was that he could always extend the five year term in the event he needed to.
- 7.7 Approximately one year after his instruction to the respondent 2nd complainant learnt that the respondent did not do what was requested. He wanted to invest a **single premium** of \$400 000 offshore and

¹ The Rand/Dollar exchange rate at the time was R7.15/\$.

\$300 000 in South Africa. As opposed to investing \$400 000 offshore, the respondent invested only \$280 000 (R2000 000) offshore, in a dollar-denominated offshore Momentum investment with policy number PP022380256 and the balance of R3000 000 (\$420 000) locally in a Momentum endowment (Policy no. PP01005003416). A few days after making the R3000 000 investment, the respondent utilised R1500 000 thereof to pay the first annual **recurring premium** on a Momentum endowment (Policy no. PP022380173) purchased on behalf of the complainant and which has a term of ten years. Again the respondent was paid commission.

7.8 As the complainant could not afford the annual recurring premium of R1500 000 on the endowment, he was forced to make the policy paid-up. The complainant subsequently learnt that making the policy paid-up had grave financial consequences for him in the form of early termination fees payable to the insurer.

7.9 The 2nd complainant asserts that he is a contract worker with no guarantee that he would be re-employed. Notwithstanding, respondent's awareness of his circumstances, he nevertheless made the unaffordable recurring premium investment. Being out of the country, and having a relationship of trust with respondent, 2nd complainant trusted the respondent with his investments. He states that he is not experienced in investments and believed that respondent as a 'professional' would act with honesty, care, diligence, and in his interest.

D. THE RELIEF SOUGHT

[8] First complainant wants to be paid an amount of R600 000 and 2nd complainant R741 000. These amounts represent the early termination fees payable to the insurer by the complainants upon making their investments paid-up.

E. RESPONDENT'S RESPONSE

[9] In terms of the Rules on Proceedings of the Office, the complaints were referred to respondent to resolve. Subsequent to receiving the complaints, the respondent informed the Office that he would compensate the complainants for the losses suffered by paying 1st complainant an amount of R600 000 and 2nd complainant an amount of R741 000.

[10] The respondent did not follow through on his promise to resolve the complaints. He was therefore requested in terms of Section 27(4) of the FAIS Act to provide the Office with his responses to the complaints and copies of his files in respect of the transactions.

[11] The respondent failed to adhere to the requests in terms of Section 27(4) of the FAIS Act. Further requests for his responses were ignored.

[12] Despite being given due notice of the complaints, it is apparent that the respondent has no intention to file responses to the complaints. I therefore proceed to make a determination on the available facts and information.² The information available consists essentially of the versions of the complainants,

² As is provided for by Rule 8(c) of the Rules on Proceedings of the Office.

e-mails exchanged between the complainants and respondent, and information provided by Momentum.

F. DETERMINATION AND REASONS

[13] The various e-mails exchanged between the complainants and the respondent substantiates the complainants' contention that they agreed to **single premium** investments. The understanding was that the investments could be liquidated after five years. Contrary to their instructions, and in violation of the General Code of Conduct³, the respondent made annual **recurring premium** investments of R1200 000 and R1500 000, respectively. In effect, the investment amounts were increased tenfold to R12 000 000 and R15 000 000. The respondent also failed to advise complainants that the term of the investments were ten years, which were completely unsuitable for their circumstances. It is not farfetched to conclude the lengthy term of ten years suited respondents' penchant for large commission pay outs. It was only when the premiums became due and payable on the endowments that the complainants realised that the respondent had acted contrary to their instructions. Unable to afford the premiums, the complainants had no alternative but to make the endowments paid-up, with the consequences of penalties. When questioned by the complainants about his failure to adhere to their instructions, the respondent became evasive and downplayed the financial implications of making the policies paid-up. Upon consulting another financial advisor the complainants learnt about the claw-backs of unrecovered

³ See Section 3(1)(d) of the General Code of Conduct.

commission and other costs on the paid-up policies. It became clear to them that by structuring the policies in the way he did, respondent benefited handsomely on commission to their detriment. Put crisply, respondent was no longer acting in the interests of his clients as the Code demands; he was on his way to the bank.

[14] In light of the evidence, I am not surprised by the respondents' failure to file responses to the complaints. The respondent not only acted contrary to instructions, he also failed to take the complainants' needs and circumstances into consideration when he made the investments in question⁴. Given their earnings, the cost of living in Dubai and the values of other investments, the complainants could clearly not afford to pay annual premiums of R1200 000 and R1500 000 respectively for a term of ten years. Quite simply there is no way that the respondent could justify the investments. In fact, he admitted to the complainants that he conducted himself improperly. The following extracts are quoted directly from e-mails sent to the complainants:

'Hi Warrick, the way I have handled your portfolio is wrong, I would give the money, that I have costed you back and hopefully get some facevalue back.

All I can say is that I am sorry

Regards Cobus' (quoted as is)

⁴ See Section 8(1)(c) of the Code

'Hi Gerald, I would like to apologize for the way I have handled your portfolio. I would also repay the money that I have costed you. Hopefully I can regain some face value.

Regards Cobus' (quoted as is)

[15] The complainants made use of the respondent's services because they trusted him. Respondent abused the trust placed in him. He placed the investments for ten years respectively without disclosing this to complainants and made what was supposed to be single premium investments, recurring premium investments. This was done with the sole purpose of substantially increasing the commission payable on the investments. It is evident from his conduct that the respondent placed his own interests before that of the complainants. I am compelled to find that the respondent failed to act with integrity and that his conduct has brought the financial services industry in disrepute.⁵

G. QUANTUM

[16] The respondent invested the complainants' funds in a manner that was not appropriate to their needs and circumstances. Had it not been for the conduct of the respondent, the following early termination fees would not have resulted.

- 1st complainant – R558 933.73
- 2nd complainant – R445 781.89

⁵ See Section 2 of the General Code of Conduct

First complainant informed the Office that subsequent to lodging his complaint, he managed to recover R78 000 of his loss from the respondent. This amount must be taken into consideration in quantifying 1st complainant's loss, i.e. R558 933.73 – R78 000 = R480 933.73.

H. ORDER

In the premises, the following order is made:

1. The complaints are upheld;
2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay 1st complainant R480 933.73 and 2nd complainant the amount of R445 781.89;
3. Interest on the aforesaid amounts at the rate of 15.5 %, per annum, seven (7) days from date of this order to date of final payment;

DATED AT PRETORIA ON THIS 16TH DAY OF APRIL 2013.



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS