IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 03613/12-13/ WC 1

FAIS 03614/12-13/ WC 1

In the matter between

GUILLAUME JOHANNES GROENEWALD **First Complainant**

MARIA ELIZABETH GROENEWALD **Second Complainant**

and

ROELOF JOHANNES NEL **Respondent**

DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS ACT')

A. INTRODUCTION

[1] This determination follows a recommendation made in respect of section 27 (5) (c) of the Act on 8 August 2017. The recommendation was not accepted by the respondent and reasons for refusal have been furnished. The recommendation is attached for ease of reference. It follows that this determination should be read together with the recommendation.

B. THE PARTIES

[2] First complainant is Mr Guillaume J Groenewald, an adult male pensioner whose full particulars are on file with this Office.

[3] Second complainant is Mrs Maria E Groenewald, an adult female pensioner whose full particulars are on file with the Office.

[4] Respondent is Roelof Johannes Nel, an adult male and sole proprietor who trades under the name and style of R & M Advisors. Respondent's business address is noted in the regulator's records as 4B Bella Casa, 14 Mascador Street, Mosselbay, 6506, Western Cape. Respondent is an authorised financial services provider (FSP) with licence number 6965, which licence has been active since 11 October 2005.

[5] Reference to complainant in this determination must be read to mean both complainants.

C. RESPONDENT'S REPLY TO THE RECOMMENDATION

[6] The salient points of respondent's reply are summarised below:

6.1 The bulk of the response was dedicated to fulminate against the Financial Services Board (FSB), the South African Reserve Bank (SARB) and the Department of Trade and Industry (DTI). Respondent made much of what he referred to as the SARB's investigation, as well as other related litigation and the fact that this Office failed to consider certain related matters that were currently before the Courts.

Respondent indicated that his investigation and due diligence of Bluezone showed that it was compliant with legislation and that Bluezone was licensed with the FSB.

6.2 He considered the refusal by this Office to comment on the submissions made by Mr Deon Pienaar as a violation of his Constitutional Rights.

6.3 Respondent denied rendering financial services to complainant and pointed that complainant had made a specific and “once-off” request. This is notwithstanding respondent’s earlier response to this Office where he conceded that he rendered financial services to complainant and even conducted a risk profile analysis for the purpose of such advice.

6.4 Respondent then claims that he provided complainant with quotations of products that offered guarantees, but the interest rates were not acceptable to complainant. He claimed that the first complainant ignored safer and conservative investments because he was “shopping” for the best interest rates. The respondent makes these statements despite claiming that he never rendered financial services to complainant.

6.5 Respondent claimed that he did not make his own representations, but relied on material provided by Bluezone, which was allegedly approved by the FSB. Respondent also indicated that the prospectus was approved by CIPRO (now CIPC).

6.6 Respondent denied advising complainant that the investment was guaranteed and stated that complainant rejected the guaranteed options.

The only instruments that could provide the income required by complainant were Bluezone or Div Investments, stated respondent.

6.7 Respondent acknowledged that complainants were moderate investors and noted that at investment stage, he considered the Bluezone investment as moderate. The fact that first complainant was a farmer exposed him to financial risks every day of his life, claims respondent. Respondent is aggrieved that complainant is now being considered a conservative investor, solely for the purposes of this complaint.

6.8 Respondent referred to the summary of the marketing material in paragraph 28 of the recommendation and noted that the questions are brought in hindsight without any substance. In his view, this Office is deliberately denying the fact that shareholders had real security in the form of the property. Property is more conservative in nature than shares on the JSE, contends respondent. According to the respondent the shareholders in this scheme owned 85% of the property; he therefore does not understand the meaning of the statement ‘should the company fail, investors might lose their investment’.

6.9 Respondent denied the preliminary findings set out in paragraph 29 to 40 of the recommendation. In short, respondent raised questions regarding his role as a financial services provider and what is required of him in terms of the Code. Respondent believes that it is unfair of this Office to expect him to define risk according to standard principles set in 2017, for a product he sold in 2006.

6.10 Respondent further believes that he complied with the Code in that he provided the complainants with the investment documentation and allowed them time to consider it without any pressure from his side.

6.11 In conclusion, respondent strongly denied causing complainant loss.

D. FINDINGS

[7] I find it imperative to first respond to the common thread that ran throughout respondent's reply about the alleged conduct of other regulators. None of these entities contributed to advising complainant. The claims made by the respondent against several regulators will consequently not be dealt with. The remainder of his response, only in so far as it has to do with the advice he provided to the complainants, will be dealt with.

Response of Mr Pienaar

[8] I mention for the sake of completeness that Mr Pienaar's response will not be considered. In a fair number of complaints involving property syndication investments[1], Mr Pienaar filed papers purporting to be acting as *amicus curiae*. Despite numerous responses which clearly state that Mr Pienaar has no legal standing in these matters, he persists in his conduct.

[9] What was requested of respondent was his response to the claims made by his clients that he failed to appropriately advise them, pointing to a possible breach of the Code. I now deal with respondent's answers to the questions dealing with appropriateness of his advice.

[1] See for example, *Mof van Niekerk Makelaars v JPH Robbertse, FAB10/2017*

Due Diligence

[10] Respondent made much of the validity and / or compliance of the Bluezone product, and the fact that it was licensed by the FSB. It is a fact that Bluezone had been licensed by the FSB. The point to note though, is that the FSB does not product regulate the industry. It remains the duty of the FSP to satisfy themselves of the risks attendant in a particular product and match the product with his client's risk profile in line with section 8 (1) (a) to (c) of the Code. There is no evidence that respondent carried this duty out in advising complainants.

[11] Despite respondent's contention that a registered prospectus existed for Bluezone, he has failed to provide evidence to this effect. Instead, the Bluezone training manual in paragraph 6.1 states that in terms of section 144 (b) of the Companies Act[2], a prospectus is not required for any offering where the minimum investment amount is R100 000 or more. Since Bluezone investments fell within this ambit, it was considered compliant. There is thus a discrepancy with the respondent's assertions and given the nature of this discrepancy, it naturally calls to question whether the respondent truly appreciated the nature of the product; it also calls into question the truth of his submissions.

Whether respondent rendered advice to complainants

[12] Respondent denies rendering advice to complainants. He claims he only responded to a 'once off request'. The undisputed facts prove that respondent advised complainants. Respondent on his own version conducted a risk profile

[2] Whether Bluezone correctly interpreted said provisions, has not been investigated. It does however not change the outcome of the matter.

analysis as a result of which complainants were established as moderate investors. He further presented complainants with products that would guarantee complainants' capital which the latter allegedly refused.

Violations of the law

[13] It is disconcerting to note that, despite the overwhelming evidence provided in the recommendation letter which included: the contraventions of Notice 459, the conflict of interested manifested by the pervasive roles of the directors and several other red flags which were evident from the summary of the marketing material, respondent still fails to see the high risk involved in the Bluezone product, and therefore, the inappropriateness of his advice

[14] Respondent failed to see that by the time he presented the marketing material to his clients, the directors were already contravening the law. The application form confirmed that money would be withdrawn from the trust account to make payments in terms of underlying agreements. This information and the obvious contraventions of law were manifest in the very material respondent claims to have provided to the complainant[3]. Respondent, therefore, cannot claim that he is being held to a different standard that is now operative in 2017.

[15] As for the contention that complainants hold shares in the property, respondent's views are incorrect. Complainants' money was invested in a Holding Company that lent investors' funds to a Property Company. One must remember that the marketing material stated that there will be a mortgage registered over the property. In exchange for the loan, the Holding Company

[3] See in this regard paragraph 28 of the recommendation

would then obtain 85% of the shares in the Property Company[4]. Respondent has not brought forward any supporting documentation that suggest that his clients have a right to the immovable property.

Comparison of the Bluezone product with products that guaranteed capital

[16] Respondent claims that despite his counsel, (yet more proof that respondent provided advice to complainants), and the provision of quotations in respect of other products which guaranteed complainant's capital, complainant rejected his advice as he wanted a higher income combined with secured capital. Why respondent recommended the Bluezone product in the light of complainant's request for a product that will guarantee his capital begs the question. On the basis of the reasoning set out in this determination, respondent rendered advice to complainants.

E. CAUSATION

[17] Complainant's losses were caused by respondent's failure to adhere to the law when providing advice to complainants. The principles of causation were explained in *International Shipping Co (Pty) Ltd v Bentley*[5]*:*

> *"The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a*

[4] Refer to the ACS Financial Management v Coetzee FAB1/2016 decision where the Appeals Board at paragraph 44 stated that:
"In other words, contrary to Snyman's belief, the investment was on the face of it not an investment in property or something akin to property; instead the investment was completely unsecured, had no underlying assets and was not guaranteed by any stretch of the imagination".

[5] 1990 1 SA 680 (A) [700 E-G]

postulated cause can be identified as a causa sine qua non of the loss in question".

[18] As was explained by the court in *Minister of Finance & others v Gore NO*[6]*:*

"*[A]pplication of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences";*

or, as was pointed out in similar vein by Nugent JA in *Minister of Safety and Security v Van Duivenboden*[7]*:*

"A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics[8]*".*

[19] Had respondent truly appreciated what he was advising complainants to invest in, he would have steered them in a different direction. Not only was the loss to investors reasonably foreseeable, it was inevitable.

[20] Complainants' loss was not caused by management failure at Bluezone, or the intervention of the SARB, but by respondent's inappropriate advice. If

6 Minister of Finance v Gore NO 2007 (1) SA 111 (SCA) para 33.

7 Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) para 25.

8 Crafford v South African National Roads Agency Limited (215/2012) [2013] ZASCA 8 para 7

respondent had adhered to the Code, no investment would have been made in Bluezone.

[21] Complainants sought investments that would keep their capital intact. For all the reasons mentioned in the recommendation, the investments were high risk and inappropriate for complainant. That the risk actually materialized, for whatever reason, is not important. Otherwise the whole purpose of the Act and the Code would be defeated. Every FSP can ignore the Act and Code in advising clients and hope that the investment does not fail. When the risk materializes and results in loss, they can hide behind unforeseeable conduct on the part of product providers.

[22] The findings made in the recommendation letter are hereby confirmed.

[23] There is one more issue that must be dealt with: the recommendation letter required respondent to revert to this Office within TEN (10) days from date of the recommendation letter but interest is meant to run from SEVEN (7) days from date of the recommendation letter. This must be corrected. Interest runs from date of determination.

F. THE ORDER

[24] In the result, I make the following order:

1. The complaint is upheld.

2. The respondent is hereby ordered to pay the complainants the following amounts within SEVEN (7) days from date of this order:

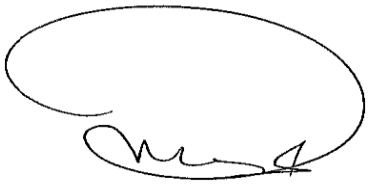
    2.1 To first complainant – R500 000

2.2 To second complainant – R500 000

3. Interest on these amounts at a rate of 10.25% per annum from the date of determination to date of final payment.

4. Upon full satisfaction of this determination, complainants are to cede their rights and title to the Bluezone investments to respondent.

DATED AT PRETORIA ON THIS THE 6th DAY OF OCTOBER 2017.



_____

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS