

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS**

**PRETORIA**

**CASE NO: FAIS 06896/09-10/NW1**

In the matter between:

**WILLEM KASSELMAN OOSTHUIZEN**

**COMPLAINANT**

and

**ANDRE W CRONJE**

**FIRST RESPONDENT**

**DANIEL LOURENS ERASMUS**

**SECOND RESPONDENT**

**JOHANNES GERHARDUS ERASMUS**

**THIRD RESPONDENT**

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

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**A. THE PARTIES**

[1] The Complainant is Mr Willem Oosthuizen, an adult male residing in the town of Orkney, North West Province.

[2] The 1<sup>st</sup> respondent is Mr Andre W Cronje, currently residing at 40 Mopani Lane, Lynn De Grace, Pretoria and who at all relevant times represented Property Spec (PTY) Ltd, FSP number 24247.

[3] The 2<sup>nd</sup> respondent is Mr Daniel Lourens Erasmus, a key individual of Property Spec (PTY) LTD and residing at 401 Visvanger Avenue,

Featherbrooke Estate, Gauteng.

- [4] The 3<sup>rd</sup> respondent is Mr Gerhardus Johannes Erasmus, a director and at relevant times key individual of Property Spec (PTY) LTD, and residing at 5 Stewart Crescent, Waverley Bloemfontein.

## **B. BACKGROUND**

- [5] This determination concerns complainant's purchase of 650 debentures at R1000,00 per debenture, in Ruimsig Gardens Properties Limited a property syndication venture promoted by Property Spec (PTY) Ltd, FSP number 24247, who were in turn represented by Cronje.

- [6] Whilst Property Spec (PTY) LTD is the name registered with the Registrar of Companies and Close Corporations, the name Propspec (PTY) LTD commonly appears on various documentation, the registration number provided confirming that they are one and the same entity. Additionally the 'Ruimsig Gardens Properties LTD Private Placing Invitation' specifically lists the 'Promoter' as Propspec and accordingly I will henceforth refer to it as Propspec.

- [7] This venture alongside those marketed by a separate legal entity which we referred to in the Canning<sup>1</sup> determination, namely Propspec Investments (PTY) Ltd, FSP 34093 failed, and despite numerous assurances over several years, of a potential buyer for the scheme and return of investors' funds; to

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<sup>1</sup> Margret Joan Cannings vs J L Swanepoel, DL Erasmus and JG Erasmus FOC 567-10/11 KZN 1

date this has not materialised.

- [8] In fact during the investigation of the Canning determination, Propspec Investments assured the Office that they were in the process of finalising a transaction with Katota Holdings, a prospective buyer of various projects whereupon investors; which would have included the complainant in this case would be repaid.
- [9] Propspec which was only authorised to sell shares, is reflected on the Financial Services Board website as having lapsed its license on the 29<sup>th</sup> June 2010 which accords with information from the Registrar of Companies reflecting company deregistration as having occurred on the 16<sup>th</sup> July 2010.
- [10] Similarly with Propspec Investments which was authorised by the FSB on the 8<sup>th</sup> July 2008 to sell shares and debentures, is reflected on the Financial Services Board's website as having had its license withdrawn on the 7<sup>th</sup> December 2011. Additionally documentation from the Registrar of Companies and Close Corporations dated 24 June 2011 reflects this entity as having been deregistered. I have however taken note of an application to place Propspec Investments (PTY) Ltd in business rescue. This application was dismissed with costs.<sup>2</sup>
- [11] At this point in time it is relevant to mention that whilst the initial documentation relating to the investment in question clearly reflects Property

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<sup>2</sup> Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another 2013 (1) SA 542 (FB)

Spec (Pty) Ltd, FSP number 24247 as the financial services provider and promoter of the scheme at the time of the investment, later correspondence to complainant in respect of the investment emanated from Propspec Investments (Pty) Ltd.

[12] The promotion of the scheme appeared then to have been taken over by Propspec Investments (Pty) Ltd who in a letter to the Office dated the 16<sup>th</sup> April 2010 state: 'Propspec Investments (Pty) Ltd is not the owners of the project. We are the promoters, authorised to market shares and debentures as per our FSP license.'

[13] Accordingly, and given Propspec's imminent deregistration the complaint was directed to Propspec Investments, who responded thereto. Additionally the complainant was also forwarded directly to the second and third respondents in their capacity as key individuals of Propspec at the time of the rendering of the advice and hence the responsible persons.

### **C. THE COMPLAINT**

[14] Medically boarded, on his version as a result of a workplace injury, complainant cashed in his pension fund. The funds were intended both to supplement the income from a grass cutting business and purchase accommodation given that complainant had been given three months to leave the company housing.

[15] Accommodation and certain extras having been taken care of, complainant

placed what was a sizable portion of the funds in a 30 day fixed deposit with a local bank. The majority thereof, namely R650 000,00 was withdrawn early on the advice of Cronje, and invested in debentures in a property syndication venture called Ruimsig Gardens Properties Limited. The maturity date thereof being May 2009.

[16] The debenture certificate itself indicated interest payable 'at a rate of 40% per annum' According to complainant at that point in time the banks were paying 7.8% as opposed to the 40% on offer from Propspec; out of which 1% would be paid out every month as income, and the balance to capital growth.

[17] Having been introduced to Cronje by a bank employee, who had herself invested with Propspec, complainant was advised by Cronje that as the Ruimsig complex was nearing completion there was minimal risk to his investment. Complainant insists that he pointed out to Cronje that these were pension fund monies which he could not afford to lose and hence should not be exposed to risk.

[18] In May 2009, and despite several assurances, the maturity date came and went without complainant being able to redeem his investment. The income however continued to pay out until August 2009, at which point complainant received an SMS from Cronje advising him that there were no more funds to pay the said income. According to complainant Cronje was to send him a registered form to facilitate the payout of his funds. This never occurred and instead complainant was subjected to one excuse after another as to why the

funds could not pay out.

[19] Given that complainant was dependant on the Propspec income to supplement the income from his grass cutting business; the cessation of income and inability to withdraw capital placed him in a precarious position which worsened when, according to complainant, he was forced to sell his business as a result of a work place injury.

[20] In consequence thereof complainant contends that he has had to sell various items just to get by, is mired in debt and dependant on family for support.

#### **D. RESPONDENTS VERSION**

[21] The initial complaint was forwarded to Propspec Investments on the 7<sup>th</sup> April 2010. Propspec Investments replied on the 16<sup>th</sup> April 2010 wherein as already mentioned in paragraph 12, they stated that 'Propspec Investments (Pty) Ltd are not the owners of the project, We are the promoters, authorized to market shares and debentures as per our FSP license'. (sic) Whilst they tendered an explanation for the cessation of income, there was nothing concrete in terms of when the income would resume or the capital pay out.

[22] There being no resolution the Office followed up with a notice in terms of section 27 (4) on the 21<sup>st</sup> May 2010. This Office further requested a comprehensive statement from the representative setting out the manner in which the financial service was rendered as well as proof that inter alia:

22.1. An analysis for the purposes of advice, based on the information

required to be obtained in terms of section 8 (b) of the General Code of Conduct for Authorised Financial Services Providers was conducted;

22.2. Products appropriate to the client's risk profile and financial needs were identified;

22.3. A record of advice as required in terms of section 9 of the General Code of Conduct for Authorised Financial Services Providers was provided.

[23] In a response which contained various documentation SC Viljoen replied on behalf of Propspec Investments on the 17th June 2010; stating that 'The advice was given according to the mandate by the client to implement a single need specifically requested by the client'. 'A financial need (sic) analysis was not conducted due to the limited nature of the mandate with the client. The advice was based on a single need'

23.1. Viljoen makes reference to an advice record; however the only record on file approximating such is a handwritten note on the Ruimsig Gardens Properties Limited Private Placing Invitation application for debentures, dated the 6th June 2008. With what appears to be Cronje's signature and the statement that the investment is a single once off investment as result of which no analysis is necessary. The note goes on to state that complainant has a grass cutting business which provides sufficient income such that he is not totally dependent on the Propspec income.

23.2. As for the documentation, the risk profile sheet reflected complainant as moderately aggressive on the basis that 'your primary goal is capital

growth. You are prepared to tolerate fluctuations in your short-term returns in anticipation of higher returns over the long term. Your portfolio will be diversified across all major asset classes with a slight bias towards equities. Your portfolio may experience short-term negative returns.'

23.3. The attached 'disclosure document' reflects A.W Cronje as a representative of Propspec, whilst the 'Declaration By Client' has several questions, each with an accompanying tick box. Amongst these are that complainant acknowledges that a risk analysis was done; that the valuation report was explained to him in a manner such that he understood the contents and that the prospectus was explained to him in a manner that he understood the terms and conditions of the investment.

[24] Additionally amongst the documentation was a statement by Cronje dated 17<sup>th</sup> June 2010 wherein he advised as follows:

24.1. Having been referred by one of his existing clients he contacted complainant and took him through some of Propspec's previous projects; discussing both the risks as well the successes which had been achieved;

24.2. Complainant was unhappy with the available bank interest rates, requiring both a better rate and capital growth.

24.3. Complainant had received about R800 000,00 from a retrenchment payout, out of which he decided to invest R650 000,00 in Propspec's Ruimsig Private Placing Debenture, a portion on improving his lifestyle



and the balance with his bank.

- 24.4. The Propspec investment offered 17% interest per annum coupled with 22% capital growth;
- 24.5. Complainant had a good income from his grass cutting business, to which would be added the interest from both Propspec and his bank account;
- 24.6. Having discussed complainant's profile, a moderately aggressive portfolio was decided upon; capital growth being the primary objective;
- 24.7. Cronje discussed the addendum to the Ruimsig Gardens Properties Ltd Private Placing invitation and specifically dealt with point 4.2 of the addendum, which dealt with the application to the local authority to increase the density of the scheme from 171 to 600 lower priced sectional title units, which would be more suitable given the prevailing interest rates and economic circumstances;
- 24.8. He further states that at that point in time it was not necessary to complete any forms or risk assessments because of the investment being a private placing debenture.

[25] In an e-mail dated 8<sup>th</sup> November 2010 and specifically directed to Cronje the Office requested that he briefly describe his understanding of the product and how the investment was entered into.

[26] He replied thereto on the 11<sup>th</sup> November 2010, stating that he viewed Propspec as a medium risk investment. Additionally the fact that Propspec supplied him with a prospectus containing all the 'pro's and con's of the

investment' and the fact that he was invited to presentations gave him confidence in Propspec.

[27] As for how the investment was entered into, his reply was essentially an expansion of his 17<sup>th</sup> June 2010 statement, the primary additions thereto being that he told complainant about the prospectus which he gave to him and explained the positive and negative aspects contained therein. Included amongst these were that the property market could experience difficulties or that there could be delays in the transfer and registration of the property.

#### **E. DETERMINATION**

[28] A brief examination of the risk factors as contained in paragraph 8 of the Ruimsig Gardens Properties LTD Private Placing Invitation document states the following:

28.1. 'The Company is a newly formed company and has therefore no trading history which can be used to evaluate the likely performance of the company and its ability to achieve its objectives'

28.2. 'There are inherent risks in any property development project including the risks of non-completion or late completion, costs of disputes, accidents and inclement weather conditions, as well as changes in interest rates or the selling price of a completed Project.'

28.3. 'Any decline in the property market or in the demand for residential property may have a material adverse impact on the Company and its ability to achieve the targeted returns.'

- [29] In a nutshell this was an investment in a new property company subject to the usual risks inherent in any such venture. Quite simply it had no track record and no means of generating income with which to pay its investors.
- [30] The majority of complainant's investable funds depended on the success or failure of this one single untested and hence risky venture, and yet there was not the slightest bit of diversification to spread risk.
- [31] Complainant depended on the income from which to supplement whatever he earned from his business, yet this entity itself earned no income whatsoever; all income was in reality being funded by new investors. This was a very real and material risk,
- [32] Section 7.(1) (c) (xiii) requires that the provider, provide full and appropriate information as to 'any material, investment or other risks associated with the product'; yet there is not a single shred of evidence that any of these material risks were pointed out, or explained to complainant. Save for this disclosure document which I refer to shortly there is no indication that a copy of the private placing documentation was given to complainant never mind explained to him. In fact when the Office requested that respondent provide proof that he had provided such documentation and explained the contents thereof to complainant, no response was forthcoming from Cronje.
- [33] Cronje in his statement dated 17<sup>th</sup> June 2010 makes no mention of risk. Instead he mentions having dealt with the increase in scheme density from

171 to 600 units. He does state that having discussed complainant's profile a moderately aggressive profile was decided upon. Other than the risk profile sheet, there is no factual basis upon which he could have reached such a conclusion. Given the absolute lack of meaningful information on complainant there is no way in which any proper evaluation of risk could have been conducted.

[34] To cap it off, the risk profile description of moderately aggressive specifically states that 'your portfolio will be diversified across all major asset classes with a slight bias towards equities.'

[35] Yet the entire investment was placed in a single start-up company without any diversification. In short this was high risk investment at odds even with the very flawed risk profile.

[36] If Cronje could not even understand this glaring anomaly then I have no doubt that he had no comprehension of the applicable risks and as such could not have adequately conveyed same to complainant.

[37] Complainant's version is that he was advised by Cronje that the project was nearing completion and hence was minimal risk. It is also complainant's version that he informed Cronje that given that these were pension fund monies they should not be exposed to risk. Cronje refers to these as retrenchment monies and essentially confirms that complainant was partially dependant on the income. Whether the funds emanated from a retrenchment

or a medical boarding as claimed by complainant, the simple fact remains that complaint was not in any position to gamble with these funds.

[38] As mentioned in paragraph 23.3, the 'disclosure document' which reflects A W Cronje as a representative of Propspec, is ticked to indicate that a risk analysis was done and that the valuation report and prospectus were explained to him in a manner that he understood the terms of the investment.

[39] If Cronje had actually understood the product then there is simply no way in which he could have recommended it to complainant. It is this simple fact that tells the lie to the statement that the product was explained to complainant in a manner which he understood.

[40] In fact in his e-mail to the Office dated the 11<sup>th</sup> November 2010 Cronje stated that he viewed Propspec as a medium risk investment. Even in this e-mail wherein he expanded on his 17<sup>th</sup> June 2010 statement, he makes mention of potential difficulties in the property market or delays in the transfer and registration of the property but not once does he mention the risk that complainant could lose his capital.

[41] Complainant advised the Office that his grass cutting business generated substantially less income than what he had earned whilst employed, yet there is no evidence on file that Cronje even conducted the most basic of analysis. This comes as no surprise given that in his handwritten note of the 6<sup>th</sup> June 2008 Cronje states that the investment is a single once off investment as a

result of which no analysis is necessary.

- [42] This is simply an excuse for what I would term a hit and run investment in that Cronje has not bothered to comply with the most basic requirements of the FAIS Act such as, section 8 (1) (a) of the General Code, which requires that a provider 'take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;' and 8 (1) (b) which requires an analysis to be conducted, based on the information obtained.
- [43] Where a client has not provided the information requested or in the light of circumstances surrounding the case there was not sufficient time to do so an exception is allowed in terms of section 8 (4) of the Code. However the client must then be advised that there may be limitations on the appropriateness of the advice and that the client should take particular care to consider on its own whether the advice is appropriate.
- [44] There is no indication of any urgency or shortage of time, either on complainant's or Cronje's version, and similarly no indication that complainant was either requested to or did not provide required information.
- [45] This is simply an attempt to evade a proper analysis as required by the FAIS Act; an analysis which would have pointed to a product very different to that sold to complainant.

[46] Despite these failings, Cronje proceeded to claim 6% commission, yet in doing so he again failed to comply with the FAIS Act in that the commission is reflected as a percentage instead of complying with section 3 (1) (a) (vii) of the Code which requires that all 'fees, remuneration or monetary obligations mentioned or referred to therein....be reflected in specific monetary terms...'

## **F. CONCLUSION**

[47] In terms of section 3.(2) (a) (i) of the Code, a provider must have appropriate procedures and systems in place to record verbal and written communications relating to a financial service rendered to a client.

[48] In addition section 9.(1) of the Code requires that a provider maintain a record of the information on which the advice was based as well as the products considered with an explanation of why they are likely to satisfy client's needs.

[49] Yet despite respondents being invited to submit documentation in support of their case, there is effectively neither a record nor any information on complainant that would allow for even the most basic understanding of complainant's needs; and hence the suitability of the product could not be determined at the time that advice was rendered.

[50] Rendering advice under such circumstances can be nothing other than non-compliance, given the failure to adhere to the provisions of the Code.

- [51] But such non-compliance goes further in that as mentioned in paragraph 9 Propspec was authorised to sell shares and not debentures, yet the complaint relates to the purchase of 650 debentures at R1000,00 per debenture in Ruimsig Gardens Properties Limited.
- [52] This is a contravention of section 7.(1) of the FAIS Act, which provides that no person may act as a financial services provider unless they have been issued a license in terms of section 8. Accordingly Propspec in acting as the promoter of Ruimsig Gardens Properties LTD Private Placing was doing so in contravention of the FAIS Act given that it had no authority to render financial services in respect of debentures.
- [53] Given the lack of authority, Cronje was acting unlawfully, and ipso facto so was Propspec and its key individuals, namely, the second and third respondent.
- [54] It is appropriate at this point to deal with the issue of the joint and several liability of the respondents. The second and third respondents were key individuals of Propspec. On the facts of this case, if I were to hold the first respondent solely liable, this would not be in line with what the legislature intended, as evidenced by the FAIS Act based on the following reasons:-
- 54.1. 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 an applicant meets these requirements that a licence will be granted.

54.2. Additionally 'no such person may be permitted to take part in the conduct of, 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.'

54.3. 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.

54.4. The fact that where the key individual does not meet the legislative requirements of fit and proper, the corporate entity's licence can be withdrawn 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. So too are all the requirements set out in Parts III, IV, V and VI;

[55] With regards to Propspec itself, the legal entity and financial services provider responsible for promoting the scheme to complainant as confirmed both in terms of the Private Placing Invitation and disclosure documentation; this entity no longer appears to exist and has been deregistered. Accordingly citation thereof would be for all intents and purposes pointless.

[56] Complainant's version is essentially that the inability to access the investment or derive any income therefrom, has negatively impacted his personal life in so far as his inability to meet his responsibilities.

[57] There can be no question that whilst insufficient to support complainant the loss of such an amount would have a material impact on all but the wealthiest. Complainant was in no position to lose these funds and Cronje had no business placing them into such an investment.

[58] It is highly unlikely that complainant will ever recover his investment; this bearing in mind that complainant has had neither interest payments nor any

concrete evidence of the repayment of his capital since as far back as May 2009.

[59] There can be no question that complainant should not have been advised to invest in this scheme in the first place. Not only was it risky but in addition thereto the lack of diversification magnified the risk.

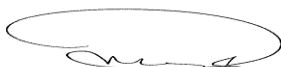
[60] Ultimately it was this inappropriate advise that caused the loss when the scheme failed.

**G. ORDER**

[61] The complaint is upheld and;

1. The respondents are ordered to pay, jointly and severally, the one paying the other to be absolved the sum of R650 000.00.
2. Interest on the aforesaid amounts shall accrue at the rate of 15.5% per annum within seven (7) days of the date of this order to date of final payment;
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 according to payment.

**DATED AT PRETORIA ON THIS THE 21<sup>st</sup> DAY OF JUNE 2013**



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**