

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

**PRETORIA**

**CASE NO: FOC 00567 -10/11 KZN 1**

In the matter between:

**MARGRET JOAN CANNINGS**

**COMPLAINANT**

and

**JOHAN LEODOLF SWANEPOEL**

**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 Mrs Margret Joan Cannings, a pensioner residing in

KwaZulu-Natal.

- [2] The 1<sup>st</sup> respondent is Mr Johan Leodolf Swanepoel, an authorised financial services provider, who in his own right carries on business at 13 Pelican Way, Nerina, Durbanville, Western Cape. However at all material times relevant to this determination Mr Swanepoel acted as a representative of Property Spec (PTY) LTD.
- [3] The 2<sup>nd</sup> respondent is Mr Daniel Lourens Erasmus, a director and 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 investment in a property syndication known as Pacific Coast Investments 97 LTD or more commonly referred to as Propspec in consequence of this investment and several other property syndications being promoted by Property Spec (Pty) Ltd.
- [6] The scheme failed and so did numerous assurances over several years, of a potential buyer for the scheme. Consequently, the return of investors' funds have to date not materialised.

- [7] Property Spec (PTY) Ltd is listed on the prospectus of Pacific Coast Investments as the promoter of the scheme. The directors of both entities according to the prospectus are Jacobobus Briedenhann Lambrechts and Jacobus Daniel Bruwer<sup>1</sup>.
- [8] 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. Accordingly I will henceforth refer to it as Propspec.
- [9] Propspec was authorised as a financial services provider (FSP 24237) on the 16<sup>th</sup> March 2006, however such authorization was limited to the sale of shares. The Financial Services Board website reflects the license as having lapsed on the 29<sup>th</sup> June 2010 which accords with CIPRO documentation reflecting company deregistration as having occurred on the 16<sup>th</sup> July 2010. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were at relevant time the key individuals thereof.<sup>2</sup>
- [10] Additionally there is Propspec Investments (PTY) LTD, FSP 34093 which was authorised by the FSB on the 8<sup>th</sup> July 2008. The key individual is currently Johan Jankowitz with the directors being the 3<sup>rd</sup> respondent and Salmon Christoffel Viljoen. This entity was authorised to sell shares as well as

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<sup>1</sup> This contrasts with a recent CIPRO report which listed the Property Spec directors as the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, appointment date 18/10/2005. The prospectus was signed by Bruwer and Lambrechts on the 24<sup>th</sup> January 2008.

<sup>2</sup> In a Propspec document confirming that Swanepoel was an authorised representative of Propspec and dated 1<sup>st</sup> April 2008, J G Erasmus signed as a key individual.



debentures and securitised debt. 3<sup>rd</sup> Respondent and Viljoen were previously listed as key individuals. Documentation from CIPRO dated 24 June 2011 however indicates that this entity has also been deregistered.

[11] The obvious link between Propspec and Propspec Investments being that they have a common director in 3<sup>rd</sup> respondent. Additionally whilst the prospectus of Pacific Coast Investments directly lists Propspec as the promoter, Propspec Investment's website evidences the fact that it fulfilled a similar role. In any event it was Propspec Investments that corresponded<sup>3</sup> with the Office and in an e-mail dated 11<sup>th</sup> May 2011 confirmed that Swanepoel was a representative under Propspec (Pty) Ltd (FSP 24237) and later Propspec Investments (Pty) Ltd (FSP 34093) as from July 2008.

[12] Propspec Investments provided various documentation and stated that 'we are in the process of finalising a transaction with a prospective buyer for Pacific Coast Investments 97 Limited (as well as other projects). On the conclusion of the purchase transaction as explained above, Mrs Cannings together with all investors will be paid their investment.'

### **C. THE COMPLAINT**

[13] In February 2008 whilst acting on the advice of respondent, complainant invested R747 000,00 in Pacific Coast Investments 97 LTD, a company and

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<sup>3</sup>The Office only became aware fairly late in the investigation that Swanepoel was acting on behalf of Propspec. At this stage Propspec had been already been deregistered.

property syndication scheme forming part of the Propspec group ('Propspec').

- [14] Two additional payments of R23 100 on the on the 26<sup>th</sup> February 2008 and R75 000 on the 25<sup>th</sup> September 2008 were also made.
- [15] Complainant was issued with a share certificate reflecting her as the owner of 747 ordinary fully paid up shares of R0.01 each in Pacific Coast Investment 97 (PTY) LTD and dated 7<sup>th</sup> April 2008.
- [16] There was also a Claim Certificate in Pacific Coast Investments 97 (PTY) LTD, reflecting an investment amount of R747 000.00 on 23<sup>rd</sup> April 2008 and maturity date of 23<sup>rd</sup> June 2009.
- [17] The actual deposit slip of the R747 000.00 placed into the trust account of the firm of attorneys representing Pacific Coast Investments 97 is dated the 28 February 2008.
- [18] The funds were derived by withdrawing a substantial portion<sup>4</sup> of an established Liberty Life Investment, which in itself had been made just two years earlier in April 2006 on the advice of Swanepoel. This essentially comprised two linked policies being a Multiple-Access Investment Plan and Investment Builder Plan invested across several funds with a moderate risk profile.

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<sup>4</sup> An amount of R770 000, 00 was actually withdrawn from the Liberty investments.

[19] According to complainant, she was advised by respondent that Liberty was not doing very well hence she should consider an investment into a property development named Prospec, which was to mature on 23<sup>rd</sup> June 2009.

[20] This did not occur and to date complainant has not received any money from her Prospec investment.

[21] Complainant was advised by a Mr Beukes from Prospec that the development would not be going ahead and that she would only receive a refund once the vacant land was sold. This came as a shock to complainant who stated that she was never aware that it would take so long or that she would only receive her money subject to the land being sold. Had this been disclosed up front she would have considered a less risky option.

[22] The funds in question represented a substantial portion of complainant's life savings, the loss of which has left her in a dire financial situation.

#### **D. RESPONDENT'S VERSION**

[23] The essence of respondent's reply to the complaint is as follows:

23.1. Complainant received the proceeds from the sale of her property in the UK and wished to invest the sum of R1,150,000.00.

23.2. 'I advised her to invest with Liberty Life. Her need was capital growth in a moderate portfolio. She and her husband received a monthly pension



from the UK and there was no need to draw an income from the funds.'

23.3. 'I advised that we use a MAE (Multi Excess Endowment) as a capital account and withdraw Lump sums every year to invest into an Investment Builder. Both these products are underwritten by Liberty and designed to create capital growth in a very tax friendly way'.

23.4. In February 2008 he advised complainant to 'withdraw R747,000.00 from Liberty to invest with Propspec (FSP 24237). This was into Property Syndication with an 18 month term and very good projected growth. We withdrew R450,000.00 from the MAE (11857277) and R320,000.00 from the Investment Builder (11858344) on 21<sup>st</sup> February 2008. These withdrawals were allowed as interest free loans.'

23.5. 'Due to the unexpected downturn in the economy, Propspec was unable to payment on the agreed date and that caused serious implications.'

23.6. 'When the investment with Propspec was made, the Liberty investment was not terminated, as it was never the intention to terminate the Liberty investment. The intention was to repay the withdrawals made from Liberty and to complete the five-year term'.

23.7. During 2009 Mrs. Cannings relocated to Durban and then decided to purchase a property. It was only at that stage that the Liberty Investments was surrendered. The funds from Propspec were then supposed to finance the shortfall. When the Propspec maturity date was not met because of the economic climate at the time, our problems started and the compliant (sic) was lodged.

## **E. DETERMINATION**

### **Accountability**

[24] Initial correspondence with Swanepoel as well as the client advice record dated 26<sup>th</sup> February 2008 led this Office to believe that Swanepoel had acted in his personal capacity under license number FSP 8356. The Client Advice Record in particular refers to the financial adviser as being Johan Swanepoel.

[25] Despite copies of his complete file of papers having been requested at an early stage of the investigation, no papers indicative of Swanepoel having acted in a representative capacity were filed.

[26] However Swanepoel is neither authorised for shares or debentures in his personal name and accordingly the Office enquired as to his authority for so acting. It was only at this point that he revealed that he had acted on behalf of Propspec.

[27] Accordingly correspondence was directed to Propspec Investments who in an e-mail dated 11<sup>th</sup> May 2011 advised that Swanepoel was a representative under Propspec (Pty) Ltd (FSP 24237) and later Propspec Investments (Pty) Ltd (FSP 34093) as from July 2008.

[28] When queried on the fact that the Financial Services Board, (FSB) appeared to have no record of Swanepoel ever having been a representative of either entity Propspec Investments tried to explain this by



stating that most of their representatives had been removed in recent months because of changed legislation from 31<sup>st</sup> December 2010.

[29] Pressed to provide evidence of the contractual relationship between the parties, Prospec Investments in an e-mail dated 11<sup>th</sup> May 2011 stated that Swanepoel was initially a representative under Seesa Commercial which in turn had a contract with Prospec. A copy of the agreement between Seesa Commercial and Prospec dated 16 April 2008 was duly provided. No evidence of an agreement between Seesa Commercial and Swanepoel was provided.

[30] Additionally Prospec Investments provided a copy of an agreement between a Golden Dividend 405 (PTY) LTD and Swanepoel dated 8<sup>th</sup> December 2008. As it turned out Golden Dividend later changed its name to Prospec Investments.

[31] Accordingly and even assuming that Swanepoel was a representative of Seesa Commercial the earliest possible date upon which Swanepoel could provide evidence of any contract or mandate to represent Prospec was the 16<sup>th</sup> April 2008.

[32] Despite this, on the 1<sup>st</sup> April 2008 the 3<sup>rd</sup> respondent in his capacity as key individual of Prospec signed a document certifying that Swanepoel had a service contract to act as a registered representative of Prospec.

[33] All of this written documentation postdates Swanepoel having 'advised Mrs

Cannings during February 2008 (my emphasis) to withdraw R747,000.00 from Liberty to Invest with PropSpec' which he confirmed with the Office in a facsimile dated 2<sup>nd</sup> August 2010.

[34] Mrs Canning's bank statements reflect the withdrawal as having taken place on the 22<sup>nd</sup> February 2008 with the payment of R747,000.00 being deposited into the attorneys trust account on the 28<sup>th</sup> February 2008.

[35] There were of course additional payments of R23 100.00 on the 26<sup>th</sup> February 2008 and R75 000.00 on the 25<sup>th</sup> September 2008.

[36] The payments and actual certificates issued by Pacific Coast Investment show evidence of the actual investment process having occurred over a period of months. I note that the share certificate is dated 7<sup>th</sup> April 2008 and reflects complainant as the owner of 747 ordinary fully paid up shares of R0.0, whilst a Claim Certificate in Pacific Coast Investments reflects an investment date of 23<sup>rd</sup> April 2008.

[37] Save for the 25<sup>th</sup> September 2008 payment the aforementioned dates are prior the certificate signed by the 3<sup>rd</sup> respondent on the 1<sup>st</sup> April 2008 wherein PropSpec in writing acknowledged that Swanepoel was its representative.

[38] Now whilst the documentary evidence confirming Swanepoel's date of appointment is important from a point of view of compliance with the FAIS Act,

it in no way changes the fact that both Swanepoel and Propspec accept that whilst rendering a financial service to complainant Swanepoel did so as a representative of Propspec. The documentation may only have been signed in April of 2008 but the relationship between the parties goes back prior to this. The test which Swanepoel did to accredit him to sell the product through Propspec is dated 29<sup>th</sup> February 2008 and the sale of the product was facilitated through Propspec as the promoter of the scheme.

[39] Now Propspec was not only the promoter of the scheme as already mentioned in para7 but also an authorised financial services provider in its own right. This right was however limited to the sale of shares and not debentures. Accordingly Propspec should have been aware that neither it nor Swanepoel were authorised.

[40] The Claim Certificate referred to in para16 is indicative of a linked debenture, a fact confirmed by the Prospectus, which states 'The prospectus for Pacific Coast Investments 97 LTD is in respect of a subscription for 35 746 (Thirty Five Thousand Seven Hundred and Forty Six linked units in the company each linked unit consisting of 1 ordinary par value share of 1c (one cent) and 1 (one) unsecured fixed rate claim of R999.99 (Nine Hundred and Ninety Nine Rand, Ninety Nine cents) inseparably linked together in a linked unit at R1000 (One thousand Rand) per linked unit'.<sup>5</sup>

[41] Neither Propspec nor Swanepoel were authorised to market such a product

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<sup>5</sup>It is relevant to note that as set out in para 15 the shares were ordinary shares as opposed to preference shares.



and in doing so contravened section 7 of the FAIS Act.

[42] Whilst Propspec Investments was so authorised on the 8<sup>th</sup> July 2004; as already mentioned the representative agreement with Swanepoel was only dated 8<sup>th</sup> December 2008. Additionally all documentation reflects Propspec as opposed to Propspec Investments.

[43] Accordingly and based on the documentation the accountable entity is Propspec duly represented by Swanepoel as opposed to Propspec Investments.

#### **Suitability of the product**

[44] The risk analysis conducted on complainant and dated 26<sup>th</sup> February 2008 reflects her as a moderate investor with a defensive focus area. The Client advice record reflects the adviser as Johan Swanepoel with license number FSB 8356. The record is very sparse and puts the reason for selection as Potential Growth with the Product selected as being Property Syndication and the Funds Selected as Pacific Coast Investment 97 (Pty) Ltd.

[45] Interestingly when Propspec Investments provided a copy of what it termed 'a written exam wherein his/her knowledge on the Project was tested,' One of the questions contained therein requests a description of the type of investor suited to investing in the company. The answer is given as a relatively conservative investor that does not want exposure to shares on the exchange and wants to

protect capital.

[46] This contrasts starkly with the prospectus of Pacific Coast Investments which is more reflective of the true risks. Indicative thereof is the paragraph 3.2 which states

[47] *'The Company has not traded prior to the issue of this Prospectus and has not made any profit whatsoever.'*

[48] Para 5.1 under RISK FACTORS states,

[49] *'An investment in the Company exposes the investor to certain risks. Some of these risks can be controlled but many are outside the control of the Company. Investors should carefully consider all risk factors as well as all other...'* The prospectus then goes on to list additional risk factors such as market risk, default of monies invested, no operating history, a list of general investment risks as well the advice that *an, 'investment in unlisted shares is not a liquid investment. There is no established market for the sale of the Share. Investors have no right to require shares to be purchased by the Company or to have their shares redeemed.'*

[50] Quite simply complainant was unknowingly exposing a substantial portion of her retirement capital in a new and untested illiquid venture. In a nutshell, a high risk investment whilst she had a moderate to defensive focus.

[51] That the product is reflected on the test as suitable for a relatively conservative investor is simply astonishing. Prospec did not mark the answer as wrong and according to Swanepoel he was issued with the certificate after completing the accreditation paper.

[52] When specifically requested by the Office to explain what due diligence was conducted in order to verify that Prospec was a sound and viable option, Swanepoel answered additional queries in the same correspondence but did not reply to this specific question.

[53] It therefore comes as no surprise to note in very small print within the Disclosure Document that Swanepoel was '*rendering financial services under guidance / instruction /supervision of a key individual or other representative until the minimum prescribed level of experience has been obtained.*'

[54] Based on the preceding paragraphs I must conclude that Swanepoel failed to comprehend the essence of the investment or its attendant risks.

[55] This nullifies the validity of a Prospec document headed 'DECLARATION BY CLIENT' which Swanepoel provided. Dated 26<sup>th</sup> February 2008 this has a list of tick box questions, signed at the end by both complainant and Swanepoel. The questions are as follows:

55.1. 'the Prospectus was given to me and the content thereof was explained to me in such a manner that I understand the terms and conditions of



the investment.'

55.2. 'The Property Syndication Disclosure in terms of Notice 459 of 2006 under the CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICE) Act, no 71 of 88, was shown to me and explained to me in such a manner that I understood the contence (sic) thereof.'

55.3. 'The Valuation Report was shown to me and explained to me in such a manner that I understood the contence (sic) thereof.'

[56] It stands to reason that if Swanepoel himself failed to comprehend the investment this erroneous understanding would have been conveyed to complainant, that is if any explanation was proffered in the first place.

#### **F. REPLACEMENT ADVICE RECORD**

[57] As stated in para18 the funds invested, emanated from an established Liberty Life investment made barely two years earlier. The underlying funds contained within this investment conformed to complainant's risk profile.

[58] Section 8 (1) (d) of the General Code of Conduct for Authorised Financial Services Providers and Representatives requires of an adviser that 'where the financial product ('the replacement product') is to replace an existing product wholly or partially ('the terminated product') held by the client, fully disclose to the client the actual and potential financial implications costs and consequences of such a replacement.....'

[59] The General Code goes on to require specific disclosure in respect of

differences in risk, applicable penalties, accessibility of the new product and of course the advisers remuneration.

[60] Queried on the lack of any such advice record Swanepoel replied as follows:

60.1. 'The funds withdrawn from Liberty, to invest with Propspec, were not treated as a replacement by myself.

60.2. The Liberty product allowed Mrs. Cannings to make withdrawals from time to time. On the Multi Access Endowment, withdrawals are treated as interest free loans and on the Investment Builder the client is allowed one interest free loan and one withdrawal during the restricted period. (during the first five years) There are no penalties involved and these loans can be repaid at any stage.

60.3. As the investment with Propspec had an eighteen-month term, the idea was to repay the loans and complete the five-year term on the Investment Builder with Liberty. At the end of five years an income and/or capital withdrawals can be made from the Investment Builder. All of these withdrawals will be tax-free.'

[61] Whatever Swanepoel's intention was, the irrefutable fact is that a substantial portion of the initial Liberty investment was withdrawn and replaced with another product. The FAIS Act makes no allowances for intention or term of the replacement and simply requires a set of disclosures in the event of a whole or partial replacement. This case is a classic example of just why such disclosures are required in the first place. Swanepoel's argument that he intended to repay the loan when the Propspec investment matured is irrelevant.

[62] His argument is para 61.2 that there are no penalties is either misleading or evidences a lack of product knowledge. Whilst the Liberty Multiple Access Investment Plan does not have penalties the same is not true for the Investment Builder. In this regard printouts forwarded by Liberty display substantial withdrawal charges as well as a small activity fee.

[63] On the 21<sup>st</sup> February 2008 printouts evidence withdrawal charges of R44,364.84, effectively penalties coupled with related activity fees of R394.21.

#### **G. DISCLOSURE OF COSTS**

[64] Queried on his commission Swanepoel advised that he was paid commission of 6% by Propspec as reflected in par 16.2 of the Prospectus. He also provided a copy of this disclosure document which in very small print states 'I hereby declare that I will receive 6% once off commission.'

[65] This does not meet the requirements of the General Code which in section 3.(1) (vii) requires that fees be reflected in specific monetary amounts except where such amount is not reasonably pre-determinable. In the present instance it was a simple task to calculate the amount of the commission and yet it was not disclosed as required.

[66] I am not surprised by this omission given that Swanepoel's bank statements reflect a Propspec commission payment in the amount of R44 820.00. This must



be contrasted with the fact that barely two years earlier when making the initial Liberty Investment Swanepoel had taken up front commission of R54, 150 on the R950 000 invested in the Liberty Multiple-Access Investment Plan. A large portion of these funds were then utilised to fund the Propspec investment<sup>6</sup>.

[67] That the replacement advice record requires disclosure of fees is understandable given that one of the purposes behind this provision was to prevent churning<sup>7</sup>.

[68] Swanepoel attempts to justify the commission by stating that Mrs Cannings received 100% allocation of her funds invested with Propspec as the commission was not deducted from her capital, but paid by Propspec.

[69] This in itself evidences a flawed understanding of the investment. The commission itself had to come from somewhere and as evidenced by para 16.2 of the prospectus it was from the investors themselves. The prospectus states as follows 'The Company may pay commission to financial services providers and their representatives who are licensed by the Financial Services Board. The rate of commission payable by the Company will not exceed **6% in total of the capital raised.**' (my emphasis)

[70] Additionally there are development costs, promoters fees and yet I note in para

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<sup>6</sup> Whilst according to Swanepoel R450 000 was used from the multi access endowment fund, account must be taken of the fact that funds were also transferred from the multi access endowment into the Investment Builder  
<sup>7</sup> Their rational replacement of one product with that of another so as to take additional commission on the same investable amount. This has advantages for the adviser both from a commission perspective but in addition reflects as the adviser as having sold additional products thereby generating so called new business.

6.2 of the prospectus that 'The net annual returns on investment (Claims) for this investment are estimated to be 30% per annum'.

[71] Under Interest on Claims and dividend policy at para 9.1 'Interest to be paid on Claims is calculated at a fixed interest rate of 30% per annum and is payable upon completion of the Project but not earlier than 14 (fourteen) months after the date of closure of the Offer.'

[72] When queried on the 30% growth rate as specified in the prospectus as opposed to the 15% reflected in the investment statement, Swanepoel advised that the projected growth rate was initially 30% as per the prospectus, but that it was adjusted down when they found it difficult to generate the growth after the downturn in the economy.

#### **H. DISCLOSURE OF TERM**

[73] Para 3.6 of the prospectus states 'The Claims of the members of the Company will be repaid from profits earned on the sale of even and sectional title units in the Project.....provided that a period of at least 14(fourteen) months has lapsed since the date of issue of the Claims.'

[74] In effect on a best case scenario the term of the investment was 14 months but this was of course very dependent on a successful sale of the units. This never occurred and to date investors have never been repaid.

[75] Complainant states that had she been informed that the return on her investment was subject to the sale of land she would have considered a less risky option.

[76] On the evidence I have no doubt that this too was not disclosed to complainant. This is a violation of the Code, which requires that material terms be disclosed to a client to enable them to make an informed decision.

## **I. RECORD OF ADVICE**

[77] Section 9 of the General Code requires that the record of advice set out a brief history summary of the information and material on which the advice was based; the financial products which were considered; and the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the clients identified needs and objectives.

[78] As noted in paragraph 44 the advice record is particularly sparse and gives no proper explanation as to why the product was selected other than to simply state 'potential growth'

[79] This reason fails to meet the requirements of the General Code. Unsurprising when one considers that the decision cannot be explained. It is difficult to comprehend how 1<sup>st</sup> respondent would have justified the replacement of his own recommendation made barely two years earlier, from moderate into a high risk illiquid investment? I note that the original Liberty investment allowed



switches into a multitude of underlying funds amongst which were property funds. These underlying funds at least diversified risk over a number of companies or managers as opposed to gambling it on a solitary company.

[80] This would also have meant that no early surrender penalties were applicable. The inescapable conclusion is that the move was commission related.

[81] Now whilst the advice record referred to above was completed on a document reflecting Swanepoel's own name and personal Financial Services Board registration number, there is an additional section within the Propspec 'Disclosure Document' also headed 'Record of Advice'.

[82] Again as with the attempt at commission disclosure, this section is also in particularly small print. It reads as follows:

82.1 'Propspec and its representatives only render advice and intermediary services in respect of financial products which are classified as unlisted securities and specifically in respect of properties syndicated by Pacific Coast Investment 97 (Pty) Ltd –Phase II'

82.2 'A Propspec Representative, under the name "Propspec" in NOT authorized to render advice or intermediary services in respect of any other financial product, as defined by the FAIS Act'.

82.3 'In view of the aforementioned limitations on the financial products, a full needs analysis in respect of my financial needs could not be undertaken.'

82.4 'As a full needs analysis was not done, there may be limitations on the

appropriateness of the advice provided by the undersigned financial advisor.'

[83] It is important to point out that the FAIS Act is there to ensure the rendering of appropriate advice, and product restrictions can in no way limit the requirement to comply therewith.

[84] Accordingly if a product is inappropriate, a provider has an obligation to advise the client accordingly and or refer them to someone with the appropriate skills, products and experience, in the event that they are ill equipped to ascertain the suitability thereof.

[85] Additionally Swanepoel was a representative in his own right and presumably perfectly capable of performing a needs analysis.

## **J. CONCLUSION**

[86] In her complaint complainant states: 'I have done my part in insuring that I am not a burden on my country and made sure that I saved throughout my life. To be treated in this manner in which Mr Swanepoel treated me, I believe is an injustice.'

[87] I could not agree more.

[88] Swanepoel's actions in this matter are akin to a ship that sails under a flag of convenience. Despite being registered as a financial adviser in his own right he

chose to align himself with Propspec for the purposes of marketing the property syndication.

[89] In turn and on the 1<sup>st</sup> April, 3<sup>rd</sup> respondent whilst acting as a key individual, signed the Propspec document certifying that a service contract existed. Yet on the documentation provided by Propspec Investments no such service contract existed at this date. This in itself is a contravention of s13 (b) (i) (aa) of the FAIS Act which then required that a service contract or other mandatory agreement, to represent the provider, exists.'

[90] However that Swanepoel acted as a representative of both Propspec and Propspec Investments was again confirmed by Propspec Investments itself in the e-mail of 11<sup>th</sup> May 2011, wherein they also made mention of Swanepoel having been a representative of Propspec Investments from July 2008.

[91] But as of July 2008; and save for the R75 000 on the 25<sup>th</sup> September 2008 the investment had already largely been completed.

[92] Additionally none of the documentation relating to this complaint relates to Propspec Investments and most certainly no documentation appears to exist wherein complainant was advised of a change in the financial services provider.

[93] In the instance the relevant entity must be Propspec itself with Swanepoel as a representative. In this regard the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent as key individuals



were entrusted by the registrar in terms of the FAIS Act with the responsibility of overseeing the activities of Propspec relative to the rendering of any financial service. In short this meant ensuring that Propspec and its representatives rendered financial services honestly, fairly, with due skill, care and diligence and in the interests of clients and the integrity of the financial services industry.

[94] One of the first requirement is that a financial services provider be licensed in terms of section 7.(1). Now not only was there no legal basis for Propspec having issued a certificate confirming Swanepoel's authority to act given that no contract was in place at the time of the initial investment but neither Swanepoel nor Propspec had any authority to market debentures, in itself a contravention of section 7 of the FAIS Act. In simple language Propspec's marketing of the scheme was illegal.

[95] Additionally Swanepoel was acting under supervision which in effect meant that he had insufficient experience and qualifications and hence acted under the 'guidance, instructions and supervision of a supervisor' who must 'conduct performance appraisals and progress assessments'<sup>8</sup>

[96] That this investment was entirely unsuitable to complainant's needs is clearly evident. That Swanepoel actually recommended this investment, considering the questionable commission, substantial early withdrawal charges and of course the related activity fees beggar's belief. Yet all of this occurred whilst he

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<sup>8</sup> Board Notice 95 of 2003

was supposedly under supervision.

[97] Clearly there was no genuine attempt to comply with either the letter or spirit of the law and this despite Propspec being registered as a financial services provider.

[98] The inescapable conclusion must be that Swanepoel actions on behalf of Propspec were for the benefit of both Swanepoel and Propspec; for certainly they offered no advantage to complainant. Swanepoel benefitted directly in terms of commission and of course Propspec was the promoter of the scheme.

[99] All of which leads me to conclude that there was improper conduct, of a such a nature as to allow me to pierce the corporate veil<sup>9</sup> and hold the directors to account. This is over and beyond the accountability imposed on 2<sup>nd</sup> and 3<sup>rd</sup> respondent as key individuals.<sup>10</sup>

[100] Despite assurance it appears increasingly unlikely that complainant will ever recover any of her losses a fact perhaps confirmed by the deregistration of both Propspec and Propspec Investments.

[101] Regrettably this is not a matter where the adviser has made an honest mistake.

Swanepoel and Propspec acted for their own account and against complainant's

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9Amlin (SA) PTY LTD v Van Kooij 2008(2) SA 558 (C) wherein Dlodo J held 'It is probably fair to say that a court has no general discretion simply to disregard a company's separate legal personality whenever it regards it as just to do so. It has however, come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil.'

10 As set out in Lindo Johan Esterhuysen v Gavin Grobler and Plum Portfolio Solutions (Pty) LTD FOC 3481/06-07 PE 5

interests from day one of this investment. Accordingly my order must reflect this.

[102] The losses suffered by complainant are as follows:

- 102.1 Primary initial investment of R747 000.00 on 28<sup>th</sup> February 2008;
- 102.2 Additional payment of R23 100.00 on 26<sup>th</sup> February 2008;
- 102.3 Additional payment of R75 000.00 on 25<sup>th</sup> September 2008;
- 102.4 Combined withdrawal charges and activity fees of R44 759.05 on 21<sup>st</sup> February 2008.

### **ORDER**

The complaint is upheld and;

1. The respondents are ordered to pay, jointly and severally, the one paying the other to be absolved.
  - a) The sum of R747 000.00 plus interest thereon from 28<sup>th</sup> February 2008;
  - b) The sum of R23 100.00 plus interest thereon from 26<sup>th</sup> February 2008;
  - c) The sum of R75 000.00 plus interest thereon from 25<sup>th</sup> September 2008;
  - d) The sum of R44 759.05 plus interest thereon from 21<sup>st</sup> February 2008;
2. Interest on the aforesaid amounts shall accrue at the rate of 15.5% per annum to date of final payment;
3. A case fee of R1000 to this Office within thirty (30) days of date of this determination.

Upon compliance with the order, the share certificates are to be tendered to respondents according to payment.



**DATED AT PRETORIA ON THIS THE 22<sup>nd</sup> DAY OF AUGUST 2011**

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**

