IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS,

PRETORIA

CASE NO: FAIS 06509/09-10/MP1

In the matter between:-

MARTHA DE BRUYN	**COMPLAINANT**
and	
MARIANDA PHILICIA CRONJE	**FIRST RESPONDENT**
GERT CRONJE BROKERS CC	**SECOND 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] Complainant is Martha De Bruyn, a 69 year old pensioner, who resides in Nelspruit, Mpumalanga.

[2] The first respondent is Marianda Philicia Cronje, an authorised financial services provider and key individual of the second respondent, of 14 Tinkies Street in Nelspruit, Mpumalanga.

[3] The second respondent is Gert Cronje Brokers CC, a close corporation with Registration number CK/93/27306/23, and an authorised financial services provider with its principal place of business situated at 14 Tinkies Street, Nelspruit, Mpumalanga.

[4] At all material times relevant hereto, the first respondent rendered financial services to the complainant and was a key individual of the second respondent. For convenience, I refer to the respondents as respondent.

B. BACKGROUND

[5] The respondent and the complainant had a longstanding professional relationship. The respondent acted as complainant's broker in several investments and managed her portfolio. In July 2007, the respondent was notified by Liberty Life that complainant's savings plan was about to reach its maturity date.

[6] On 11th July 2007 the complainant met with the respondent so that they could complete all necessary documentation for the release of complainant's Liberty savings

C. BLUE ZONE

[7] Sometime in July 2007 the respondent advised the complainant, then 65 years old, to invest in the Spitskop project that was marketed by Blue Zone. Complainant says in her complaint that she specifically asked whether the scheme was a pyramid scheme but that the respondent assured her that it was not and that the invested money would be safe.

[8] It is perhaps, convenient to sketch some background on Blue Zone and its Spitskop project. Blue Zone was a property syndication which promoted Spitskop Village Ltd.

[9] The complainant and the respondent have all submitted paperwork which relate to Blue Zone, Spitskop, and all other related entities and investments. In relation to the present complaint, investment was solicited from members of the public to raise an amount of R425 million to fund the Spitskop Project. The project entailed the development of housing intended to be sold to members of the public and in particular to people involved in mining in the immediate area. Further detail about Blue Zone Spitskop can be read from the determination of Black v Moore, (available from this office's website).

D. THE COMPLAINT

[10] Complainant states that her complaint arose when she came across media articles in the business section of an Afrikaans newspaper called "Rapport, which indicated that all was not well with Blue Zone. There, she learnt that Blue Zone's Spitskop project was on the verge of liquidation. According to the complainant, she then immediately contacted the respondent who insisted that the investment was fine and that she would get her money back. Despite

these assurances from respondent, complainant nonetheless lost her investment when Spitskop was eventually placed under liquidation. Complainant alleges that she had emphatically informed the respondent that she could not afford to lose the invested money as it was all she had for retirement. She holds respondent liable for the damage she suffered. The basis for this is that respondent failed to appropriately advise her.

E. THE REPSONSE

[11] Upon receipt of the complaint, this office then issued the statutory notice in terms of Rule 6 (b) of the Rules on Proceedings of this office and later a notice in terms of section 27(4) of the FAIS Act calling upon the respondent to resolve the matter or file their full response. The matter could not be settled, and the respondent accordingly filed a written response. In what follows below, I deal with the response:

[12] As already stated, when the respondent rendered financial services to the complainant advising her to invest in Spitskop, she was a key individual of the second respondent, Gert Cronje Makelaars. The respondent also submits that she was also appointed in terms of section 13 of the FAIS Act as a representative of Blue Zone Investments (PTY) LTD.

[13] In that regard, the respondent submitted that she rendered advice to the complainant in her representative capacity whilst under supervision from Blue Zone Investments, and not in her capacity as key individual of Gert Cronje Makelaars. I pause to mention that all paperwork done by the respondent when she advised the complainant indicated that she was rendering services

on behalf of the second respondent. Throughout her communication with the complainant, the respondent held herself out as a key individual of the second respondent and gave the impression that she was acting as such. To illustrate the point, the paperwork submitted by the respondent was in the letterheads of the second respondent. There was no trace of any sign of supervision by Blue Zone. I will return to this point later.

[14] In July 2007, the respondent says she was notified by Liberty Life that the complainant's savings plan was about to mature. As the complainant's broker in charge of her portfolio, the respondent contacted the complainant in order to arrange payment of the maturity value and to discuss other future potential investments.

[15] On the 11th July 2007 the respondent consulted with the complainant. During that consultation, the complainant completed all the necessary documentation for the maturity of her savings plan. An amount of R139 397.46 was paid to the complainant on the maturity date.

[16] Respondent further stated that when considering future investment opportunities, the investment term was firstly taken into account. Respondent and the complainant then compared the Blue Zone investment with ABSA's money market rates and potential investment growth.

[17] ABSA's money market rates at the time were 9.25% whereas Blue Zone guaranteed an income of 10.12% in August 2007 with an increase to 10.87% in August 2008. In addition to the income, Blue Zone Investments projected a potential capital growth of 20%. According to the respondent the project was

due for completion on the 1 August 2009, when all investors' capital would become payable in full.

[18] Respondent alleges that she took into consideration the above-mentioned information, together with the fact that she had a written guarantee for the investors' capital from Blue Zone when recommending the Blue Zone Investment to the complainant.

[19] The respondent further alleges that she did not consider the investment as high risk.

[20] In January 2009, the complainant contacted the respondent and requested the latter withdraw her investment from Blue Zone. However, it was only at that point that the respondent brought it to complainant's attention that there was a 10.5% penalty payable at the early withdrawal of the investment. The complainant was unhappy with the penalty fee and felt that it was too high. She accordingly contacted Blue Zone (Nelspruit) directly.

[21] The respondent further alleged that after she had pointed out that there was a penalty fee payable on early withdrawal, complainant then chose to correspond with Blue Zone from then onwards. The respondent further alleged that the complainant consulted (in person) with Blue Zone on at least two occasions.

[22] On the 20th July 2009, the respondent received a fax from the complainant. . The respondent alleges that due to the fact that the complainant chose to correspond directly with Blue Zone from January 2009, she did not have all

the required information relating to the investment. The respondent then referred the complainant directly to Blue Zone.

[23] On the 24th August 2009, the respondent received another fax from the complainant with a copy of an article in “Rapport” dated 23 August 2009.

[24] Furthermore, the respondent alleges that when she contacted the complainant, the latter informed her that she (complainant) was too angry to speak to her and refused to discuss the matter. Subsequently, the respondent alleges that her attempts to secure an appointment with the complainant were unsuccessful as the complaint refused to meet with her.

[25] After several unsuccessful attempts for a meeting, the respondent and the complainant were unable to meet. Accordingly, the matter remained unresolved.

F. ISSUES

[26] The issues in this determination relate to the following:

(a) Whether the respondent rendered the financial service herein negligently/or in a manner which is not compliant with the FAIS Act; and

(b) If it is found that the respondent did render the financial service negligently/and or failed to comply with the FAIS Act, whether such failure caused the complainant’s loss.

(c) Quantum.

G. DETERMINATION AND REASONS

[27] At the outset, the question arises as to whether the respondent carried out any objective due diligence to satisfy herself that the Blue Zone product could be safely marketed to members of the public? The answer to this question is pertinent to the obligations of the broker as encapsulated in the General Code of Conduct of the FAIS Act. ("the Act"). So even in the pre-FAIS era, the principles underlying the broker's liability were enunciated at some considerable length by our courts. Those principles were then codified by the legislature and gave birth to the current FAIS Act, and its subordinate legislation.

[28] Accordingly, the Supreme Court of Appeal remarked on the responsibility of the broker in circumstances where the type of investment appears to be complex. In particular, in *Durr v ABSA Bank Ltd and Another 1997 (3) SA 448 (SCA)* the supreme court of appeal considered the duties of a broker at 463, and made the following observation:

> "*The important issue is that even if the advisor himself does not have the personal competence to make the enquiries, I believe it is incumbent upon him to harness whatever resources are available to*

him or if necessary to ask for professional, legal or accounting opinion before committing his client's funds to such an investment"[1]

[29] The respondent maintains that she did not consider the investment as high risk but fails to advance any reasons explaining the basis of her confidence in the stability of the investment she advised the complainant on. The Blue Zone scheme comprised of unlisted commercial shares in a property syndication. The respondent did not make any assessment or independent investigation into the Spitskop project or how it purportedly was meant to run and earn money.

[30] A scheme that promises in excess of 10% income whilst the property is still being developed and before it is operational and earning money should have raised concerns in the mind of any diligent broker. At the time of the investment, there was no evidence of any development having been undertaken, nor had there been any rezoning of the agricultural land on which the property was meant to be based.

[31] Cursory investigation by the respondent would have alerted her on the possibility that the investors were paid on their own capital. This phenomenon should have prompted the broker to probe further into the inner workings of the Spitskop/Blue Zone syndication as all the signs signalled trouble.

[1] Black v Moore at Para 54 FAIS 01110/10-11/WC 1

[32] With regards to the issue of the income being guaranteed by Blue Zone Property (Pty) Ltd, the respondent gave no details of how she understood that Blue Zone was going to achieve this, she merely took the guarantee letter furnished by Blue Zone at face value and negligently invested the complainant's funds in the scheme based on this blind faith. The respondent merely became a conduit for Blue Zone. As a professional who had obligations stemming from the General Code, the respondent failed to exercise any independent or professional judgment when advising the complainant. In a word, the guarantee was not worth the paper it was written on.

[33] The income promised at 10% and a potential capital growth of 20% was well over market value especially considering that the amount invested was just over R100 000 for a period of two years. This fact would have raised suspicion in the mind of any diligent broker.

[34] In terms of Part II section 2 of the Code, the provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry. Had the respondent conducted a proper due diligence of the investment, she would have realised that the scheme was not commercially viable[2]. The provider, based on the facts of this case, failed to comply with the duty to render financial services as provided for in Part II section 2 of the Code.

[2] Black v Moore at Para 137- FAIS 01110/10-11/WC 1

H. COMPLAINANT'S RISK PROFILE

[35] As a pensioner, the complainant's risk tolerance was inconsistent with an investment in property syndication. Although some form of risk analysis was conducted by the respondent, this was done merely as process and was not taken seriously by the respondent. Even as the results of the complainant's risk profile indicated that she was a moderately conservative investor, the respondent saw it necessary to put her investment in a high risk scheme that was incompatible with complainant's risk profile.

[36] The clients' risk analysis gave an option between shares in commercial property and shares in older established companies. Faced with this option, the complainant expressly selected an investment in older established companies. Further analysis of her risk profile indicates that she was saving for retirement and required an investment that secured her capital.

[37] The complainant indicated a need for consistency and a high degree of stability and predictability of her investment return and expressly indicated how important it was that her capital remained secure as she could not risk losing it. The respondent's purported comparison between Blue Zone and ABSA's money market was puzzling, to say the least. Blue Zone had no track record against which it could be judged which made it all the more important for the broker to exercise caution when advising clients to invest in the scheme.[3] All that Blue Zone had were untested promises of huge returns. Other than such promises, there was nothing concrete on which Blue Zone

[3]Naidoo at Para 87 FAIS 04214/09-10/NC 1

could be measured. This made it all the more important for the respondent to conduct a proper due diligence on the viability of Blue Zone's business claims. For the record, the Spitskop project never got off the ground. The respondent had an obligation to explain the risks involved in the Blue Zone scheme.

[38] The respondent also had a duty to point out to the complainant, the downside of investing in unlisted properties. She chose to merely repeat what Blue Zone would have conveyed to her. But the respondent presented herself as an expert who could assist the complainant in investing her money, and ought to have acted in accordance with her professional expertise.

[39] The complainant's personal circumstances and previous investment record which was readily known to the respondent indicated that she was clearly very risk averse and could not accept any loss. More caution should have been exercised as the complainant was a pensioner and would have no further access to capital. The complainant expressly stated that she had no emergency funds. She only had what was being invested.

[40] The respondent's conduct marked a contravention of section 8 (c) of the general code of conduct as the financial product identified was not appropriate to the clients risk profile and financial needs. The respondent did not act within the scope of her mandate.

[41] It can in fact be said that the risk profile was conducted merely as a procedural step to feign the appearance of legitimacy and no consideration of it was borne in mind when selecting to invest in Blue Zone. The respondent

admits that she had already made the decision to invest in Blue Zone purely based on the fact that at the time ABSA's money market rates were 9.25% whereas Blue Zone purported to guarantee an income of 10.2% with an increase to 10.87% the following year.

[42] The respondent was expected to apply her mind to the results of the complainant's risk profile. She was then expected to recommend investments that were consistent with the complainant's risk profile. It was clear that at the outset, the respondent's intention was to sell Blue Zone. The respondent acted more like a sales marketer for Blue Zone instead of a financial advisor who bore the responsibility of properly advising her client.

[43] It is clear from the foregoing that the respondent failed to objectively assess the financial product and assess its suitability for the complainant based on her risk profile.

[44] In the present matter, the complainant was dependent on the respondent for professional and sound advice on the appropriate investment she needed to make. Respondent failed to exercise the necessary care and skill to ensure that she properly advised the complainant to invest according to her risk profile and circumstances; which failure was the cause of complainant's loss.

[45] The conduct of the respondent resulted in complainant investing in a scheme that was incompatible with her financial needs and risk profile. As a result, the complainant lost her investment. Had the respondent properly advised the

complainant she would have put her money in a suitable scheme that accorded with her risk profile as an investor.

I. DISCLOSURE IN TERMS OF PART IV SECTION 5 OF THE CODE.

[46] Regarding respondents' claim that she acted as a representative of Blue Zone and not in her capacity as key individual of the second respondent, this claim must fail. The provider ought to have disclosed in terms of section 5 of the Code her full details. This in my view she did. She communicated to complainant that she is rendering the service to her as a representative of second respondent. Complainant accepted this and the papers forwarded to this office confirm the earlier version. The later version that she acted as a representative of Blue Zone is in my view an afterthought calculated to save second respondent from liability.

J. FINDINGS

[47] Consequently, I find as follows:

(a) The respondent advised the complainant to invest in the Spitskop/Blue Zone scheme;

(b) At the time of the advice, the respondent presented and was accepted by complainant as the representative of second respondent;

(c) The respondent failed to appropriately advice complainant and to make appropriate disclosures as the Code demands;

(d) The respondent failed to conduct any due diligence on the Spitskop/Blue Zone scheme;

(e) The Spitskop scheme never got off the ground;

(f) The investors were paid some monies despite the fact that there was never any commercial activity being undertaken by Blue Zone as part of the Spitskop project;

(g) The respondent failed to question how Blue Zone could purport to be paying investors high returns when no commercial activity was underway and the Spitskop project had not commenced;

(h) The respondent failed to take into account the complainant's risk profile;

(i) The advice given by the respondent to the complainant was inappropriate and contrary to the various provisions of the Code, as set out in the preceding paragraphs of this determination.

(j) As a result of the respondent's failure to adhere to the Code, she negligently committed complainant's money into the Blue Zone scheme. The complainant then lost her investment.

[48] As stated, the first respondent was the key individual of the second respondent. Both respondents are therefore jointly and severally liable, the

one paying the other to be absolved, for the loss sustained by the complainant.

K. ORDER

In the result, I make the following order:

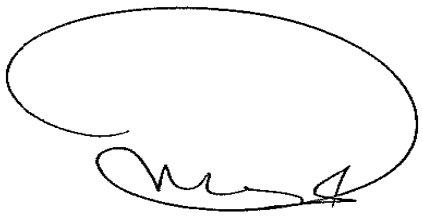
1. The complaint is upheld.

2. The respondents are jointly and severally liable for the loss sustained by the complainant, the one paying the other to be absolved.

3. The respondents are ordered to pay the complainant, jointly and severally, the amount of R120 000.

4. Interest at the rate of 15.5 %, seven days from the date of this decision.

DATED AT PRETORIA ON THIS THE 6th DAY OF MAY 2013.



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