

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 06244/09-10/ MP 1

In the matter between:

ALETTA SUSANNA MINNIE

COMPLAINANT

and

JOHANN FREDERICK VAN ZYL

FIRST RESPONDENT

SALMON CHRISTOFFEL VILJOEN

SECOND RESPONDENT

JOHANNES GERHARDUS ERASMUS

THIRD RESPONDENT

JOHAN JANKOWITZ

FOURTH RESPONDENT

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

A. THE PARTIES

[1] The Complainant is Mrs Aletta Susanna Minnie, a pensioner residing in Nelspruit/Mbombela, Mpumalanga.

- [2] The 1st respondent is Mr Johan Frederick van Zyl, at all relevant times an authorised representative of PropSpec Investments (Pty) Ltd, FSP 34093. Mr van Zyl currently conducts business for his own account at 9 Rhenosterkop, Nelspruit/ Mbombela.
- [3] The 2nd respondent is Mr Salmon Christoffel Viljoen, a director and key individual of PropSpec Investments (Pty) Ltd, FSP 34093, residing at 19 Juta Street, Heuwelsig Bloemfontein.
- [4] The 3rd respondent is Mr Gerhardus Johannes Erasmus, a director and key individual of PropSpec Investments (Pty) Ltd, FSP 34093, residing at 5 Stewart Crescent, Waverley Bloemfontein.
- [5] The 4th Respondent is Mr Johan Jankowitz a key individual of PropSpec Investments (Pty) Ltd, FSP 34093, residing at 12 Strydom Street, Fichardt Park, Bloemfontein.

B. BACKGROUND

- [6] This determination concerns complainant's investment in three property syndication ventures promoted by PropSpec Investments, which were in turn primarily represented by van Zyl as their authorised representative.
- [7] The ventures themselves alongside those marketed by Property Spec (Pty) Ltd, failed and despite numerous assurances over several years, of a potential buyer for the scheme and return of investors' funds; to date this has

not materialised.

- [8] In fact during the investigation of a prior determination¹, Prospec 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 would be repaid.
- [9] Prospec Investments which was authorised by the FSB on the 8th July 2008 to sell shares and debentures, is reflected on the Financial Services Board website as having had its license withdrawn on the 7th December 2011. Additionally documentation from the Registrar of Companies and Close Corporations dated 24 June 2011 reflects this entity as having been deregistered.
- [10] Similarly with Property Spec (Pty) Ltd, the Financial Services Board website reflects the license as having lapsed on the 29th June 2010 which accords with information from the Registrar of Companies reflecting company deregistration as having occurred on the 16th July 2010.
- [11] Given the names Property Spec and Prospec, the ventures are commonly referred to as Prospec. In the matter at hand reference to Prospec will be in respect of Prospec Investments unless specifically indicated otherwise.
- [12] The Financial Services Board reflects Johan Frederick van Zyl as a

1. Margaret Joan Cannings vs JL Swanepoel, DL Erasmus and JG Erasmus FOC 567-10/11 KZN 1

representative of Propspec Investments with the key individuals being reflected as Johannes Gerhardus Erasmus, Johan Jankowitz and Salmon Christoffel Viljoen.

- [13] The disclosure documentation of Propspec Investments as attached to the Grey Haven Riches 19 investment reflects the registered key individuals as Mr JG Erasmus, Mr J Jankowitz and Mr SC Viljoen.

C. THE COMPLAINT

- [14] As already mentioned, the investment relates to an investment in three property syndication ventures. The investment entity, investment amount and date of investment, as detailed on documentation issued by Propspec, is as follows:

[Grey Haven Riches 15 Limited, Propmed, Kimberley – R200 000 on 3rd April 2009].

- 14.1 Grey Haven Riches 19 Limited, Olympus Ridge, Pretoria – R100 000 on 3rd September 2009.
- 14.2 Ruimsig Gardens Properties Limited – R20 000 on 6th April 2009, with the maturity date give as the 31st May 2009
- 14.3 It is appropriate to point out that whilst the Grey Haven Riches 19 date of investment is reflected as 3rd September 2009, complainant informed the Office that this was made on the same day as Grey Haven Riches 15. Additionally Propspec provided the Office with a copy of the Grey Haven Riches 19 application forms which indicates the date as the 4th April 2009.

- [15] Save for Ruimsig Gardens, no maturity date is reflected on these investment certificates although the Private Placing Invitation documentation in respect of Grey Haven Riches 19 reflects the term of the investment as approximately 24 months but dependant on the sale of the properties.
- [16] Grey Haven 19 provided a monthly income of R1 000-00 whilst the monthly income on Grey Haven 15 was R2 000-00; thus a combined income of R3000-00². The Ruimsig Gardens investment being promoted as a short term capital growth investment.
- [17] The advice in respect Grey Haven Riches 15 and 19 was rendered by Van Zyl as the adviser, whilst accompanied by a Mrs Heidi de Villiers, the broker consultant.
- [18] The disclosure documentation, as provided by Propspec, in respect of Grey Haven Riches 15 and 19 is signed by both complainant and van Zyl, and confirms van Zyl as the adviser on record with no mention being made of Mrs de Villiers.
- [19] As no disclosure documentation was provided in respect of Ruimsig Gardens, additional enquiries were made with complainant, who advised that she had independently been approached by Mrs de Villiers who informed her that another investor urgently needed to sell her investment and hence would

2. This does differ from van Zyl's version of an income of R2 800-00

complainant take over this investment. As the term was short and offered a good return, complainant made the investment.

[20] According to complainant; having on several occasions advised Mrs de Villiers and van Zyl that this was the last of her savings, they both assured her that her monies would be safe and would be placed in trust. Additionally she was advised that Prospec was registered with the Financial Services Board with Zyl personally having invested one million rand in Prospec.

[21] Complainant is very concerned as she was dependant on the income to fund her living expenses. In her complaint, she asks what has become of the money and why she does not get an income.

[22] Complainant denies having been alerted to the risks or even having received a prospectus for any of the investments.

D. RESPONDENTS VERSION

[23] The initial complaint was forwarded to Prospec on the 7th April 2010. There being no resolution, this was followed up with a notice in terms of section 27 (4) on the 21st May 2010. In terms thereof, we 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:

23.1 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;

- 23.2 Products appropriate to the client's risk profile and financial needs were identified;
- 23.3 A record of advice as required in terms of section 9 of the General Code of Conduct for Authorised Financial Services Providers was provided;
- 23.4 In a response signed by SC Viljoen, Prospec investments replied on the 17th June 2010. The gist thereof follows:
- 23.5 'The advice was given according to the mandate by the client to implement a single need specifically requested by the client. Attached hereto a copy of the "client mandate and record of advice"³ "A financial need analysis was not conducted due to the limited nature of the mandate with the client. The advice was based on a single need'

[24] Attached to the reply from Prospec was the representative statement in the form of a letter from van Zyl dated 12th June 2010. His version is as follows:

- 24.1 Having been referred to complainant by an existing client, he opened a file and considered the fact that she required income as well as capital growth;
- 24.2 Accompanied by Mrs Heidi de Villiers, the broker consultant for Prospec; the contents of three different Prospectuses were shared with Mrs Minnie; namely Grey Haven Riches 15 (Pty) Ltd Grey Haven Riches 19 (Pty) Ltd and Ruimsig Private Placing.
- 24.3 In total an amount of R300 000 was invested with the object of earning a monthly income of R2800 per month, as the R20 000 invested with Ruimsig was meant to be for Capital Growth only.
- 24.4 He stated that complainant appeared to be satisfied with the investment, as

3. I deal with these documents in the determination

with his consent, she visited Mrs de Villiers at the Propspec regional offices where the documentation was completed;

24.5 According to van Zyl, when he co-signed the documentation he was assured by Mrs de Villiers that the economy, inflation and other risk factors that could influence the investment in terms of risk were explained to Mrs Minnie.

[25] Interestingly when we specifically forwarded him a notice in terms of section 27(4) on the 16th July 2012, wherein we requested proof that he had provided the complainant with a prospectus, and an explanation as to why such a high risk investment was recommended to complainant, he responded by denying that he had rendered the advice, instead asserting that all information and technical details had been provided by Mrs de Villiers.

[26] Additionally, he went on to insist that the complaint was not against himself but against Propspec who were currently busy with certain actions in an attempt to return investors' money.

[27] Accordingly he provided no evidence of a risk profile, needs analysis or advice record, but did confirm in an email of the 19th July 2012, that he advised that he had personally taken out a bond on his property, and personally invested R1000 000 in Propspec.

E. DETERMINATION

[28] That complainant is a pensioner dependant on her investments would be hard to refute, given that respondents are not in any position to even comment on

her situation, given that despite having rendered the advice, amongst the file of papers provided by respondent there is not so much as a risk profile, needs analysis or any documentation that that would in any way evidence the slightest attempt on the part of respondents to understand complainant's needs prior to recommending the products.

[29] This, despite the aforesaid being a requirement as prescribed by 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.

[30] 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, this allows for an exception 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.

[31] Prospec provided the Office with various documentation⁴ amongst which is a 'Client Mandate and Record of Advice' pre-printed form, which states amongst others 'I hereby request the Advisor, to advise me on and implement the

4. Expected differences aside, the documentation in respect of Grey Haven Riches 15 and 19 materially similar

Single Need I specifically request, which need has arisen as a result of my voluntary request for subscription for units (shares) in the public offer made by Grey Haven Riches 15 (Pty) Limited as set out in the Prospectus....’ ‘A comprehensive needs analysis or risk profile will not be conducted by the Advisor due to the limited nature of this mandate and record of advice.....’

[32] Whilst the aforementioned document is clearly an attempt to fall within the section 8 (4) exception, it in no way meets the requirements. Quite simply there is no indication of any urgency or shortage of time, either on complainant’s or respondent’s version, and similarly, no indication that complainant was either requested to, or did not provide requested information.

[33] This is clearly an attempt to evade a proper analysis as required by the FAIS Act; which analysis clearly would have pointed to a product very different to that sold to complainant.

[34] This same ‘Client Mandate and Record of Advice’ goes on to state that ‘I hereby acknowledge that I have read the Prospectus, annexures and all documentation relating to the public offer by Grey Haven Riches 15 (Pty) Ltd and I fully understand the contents thereof.’ This goes on to acknowledge that the investment is not guaranteed and that unlisted shares are not readily marketable and that she could lose her investment should Grey Haven Riches 15 (Pty) Ltd not reach their objective.

[35] Now, not only was this in small print, but there is no indication that

complainant's attention was drawn to what she was signing, never mind actually having had the documentation explained to her in a manner which she could understand. Van Zyl did not bother to comply with section 8 (1) (a) of the code which requires that a provider take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation and experience.

[36] Other than complainant's version that she is widow of limited means, dependant on the income and van Zyl's version that she required income, and capital, respondents file contains nothing which would allow a financial adviser to make a competent recommendation as to a suitable product or any indication as to her level of understanding of financial products.

[37] Section 3 (1) (iii) of the Code requires that representations made by a provider must be adequate and appropriatetaking into account the factually established or reasonably assumed level of knowledge of the client.

[38] In any event complainant denies ever being given a prospectus, something which comes as no surprise given that Van Zyl admits in his letter of the 12th June 2010 that complainant visited the broker consultant with his consent, where she completed and opened the documentation; whilst he was reassured by this consultant, when he co-signed the documentation that the economy, Inflation and other risk factors that could influence the investment in terms of risk were explained to Mrs Minnie.

- [39] In a letter dated the 16th July 2012, the Office requested that van Zyl provide proof that the prospectus was provided to complainant, in addition to explaining why such a high risk investment was provided. Instead of answering the question he responded by denying that the complaint held him accountable; additionally stating in an e-mail dated the 31st July 2012 that at no stage did he render advice and that the broker consultant in Nelspruit gave all the technical details to complainant.
- [40] This despite the letter of the 12th June 2010 referred to in para 45 wherein he additionally stated that having been referred by an existing client, he opened a personal file on her and considered the fact that she required income as well as capital growth.
- [41] Additionally there is the form headed 'PROPSPEC INVESTMENTS DETAILS OF THE ADVISOR (DULY REGISTERED REPRESENTATIVE OF PROPSPEC INVESTMENTS) is given as J F van Zyl, with what appears to be his signature and that of complainant. This states that the advisor is a registered representative under Prospec Investments (Pty) Ltd (34093) and that Prospec Investments (Pty) Ltd accepts full responsibility for the Advisor. Additionally it states 'The advisor is rendering financial services under guidance/ instruction/ supervision of Prospec investments in terms of a mandate.
- [42] As the advisor of record, it is his responsibility to render advice in a manner compliant with the FAIS Act, and yet by his own admission he abdicated this

responsibility to the broker consultant; with no evidence whatsoever that complainant was appraised of the risks as specifically required by section 7 (1) (c) (xii) of the code.

[43] Instead, on the contrary, complainant's version is that she was reassured that this was a safe investment, after all what better assurance than the fact that the adviser had invested one million (R1 000 000,00) of his own money in the venture.

[44] The Grey Haven Riches¹⁵ (Pty) Ltd Private Placing Invitation document lists the risks amongst others as no operating history, market risk, no established market for the sale of the linked units. I note the following statement under Risk Factors within the Private Placing 'An investment in the Linked Units of the Company exposes the investor to certain risks. Some of these risks can be controlled but many are outside the control of the Company.' Under claims it is stated that the claims are not secured. This was an offer for linked units 'consisting of one ordinary par value share of 1c (one cent) and 1 (one) unsecured fixed rate claim of R999.99 (nine hundred ninety nine rand and ninety nine cent) inseparably linked together in a linked unit....'

[45] Grey Haven Riches 19 Limited Private Placing Invitation states under 'History, Prospects of the Company' we find 'The company has not traded prior to the issue of this Private Placing and has not made any profit whatsoever.' Under 'Risk Factors' we see 'An investment in the Linked Units of 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 information included in this Private Placing' It also states 'An investment in unlisted Linked Units is not a liquid investment. There is no established market for the sale of Linked Units.' It also essentially states that the figures are based on financial projections and are not guaranteed.

[46] Yet there is no indication that this was given to, or pointed out, to complainant. Quite simply not only were the risks not disclosed but the documentation does not clearly reflect the term of the product or the extent to which it is easily realisable amongst other requirements of section 7 of the code.

[47] Despite these omissions, van Zyl proceeded to claim 6% commission. Here again there is inadequate disclosure. Van Zyl's 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 and payable to the product supplier or the provider, be reflected in specific monetary terms....'

[48] I also find it interesting that in the Grey Haven Riches 15 Client Mandate and Record of Advice which with reference to complainant states 'I confirm and understand that the financial service provided by the Advisor is limited to advice on shares and debentures in terms of Grey Haven Riches (15 (Pty) Ltd Prospectus only. It is specifically recorded that it is my responsibility to action any further /other financial needs/objectives through the same or a third

advisor....’

[49] Yet despite van Zyl being a registered adviser in his own right, licensed to sell a range of products, a number of which would no doubt have been eminently more suitable to complainant, he instead chose to promote a product wholly inappropriate to her risk profile.

[50] Correspondence on file from Propspec Investments dated 27th March 2009, relates to the potential purchase by Katota Holdings of the Ruimsig scheme. The purpose of selling the venture was that already at the point at which complaint bought into the scheme, it was already in trouble with efforts being made to sell. Whilst this letter refers to the Ruimsig venture, it is equally applicable to the Grey Haven ventures.

[51] Letter from propspec Investments dated 16th April 2010 states that all payments are up to date as of 11th April 2010. This seems to have been about the last payments that complainant received.

[52] Emails from propspec are copied to Johan Jankowitz , Gerhard Erasmus and Chris Viljoen.

F. CONCLUSION

[53] That Propspec is the accountable entity that rendered the advice is not disputed. Van Zyl himself as its representative, makes mention of showing complainant all three prospectuses and going on to mention that the Ruimsig investment was to be for capital growth.

- [54] It was only upon noting that there appeared to be no compliance documentation in respect of Ruimsig, that further enquiries with complainant revealed that this investment had been directly sold to complainant by Mrs de Villiers.
- [55] Quite why no mention was made of this in respondents reply is unknown; although the fact that Mrs de Villiers probably had no authority to do so may have played a role in this omission. However Mrs de Villiers clearly acted on behalf of Propspec and thus in no way alters its accountability. This does however slightly diminish van Zyl's responsibility. Propsepc itself is no longer in existence and as such, it is the key individuals who are accountable.
- [56] The license to render financial services is a privilege. To abuse this privilege by promoting unsuitable investments to pensioners is inexcusable. Providers cannot hide behind the excuse of a so called single need specifically requested by clients. That the compliance documentation almost universally refers to this so called single need is just far too much of coincidence. Not only does it fail to comply with the provisions of section 8 (4) of the code, but is in itself a clear and intentional misrepresentation that will not be tolerated.
- [57] In the matter of hand, I can find nothing that points towards these products as having been suitable to complainants needs and as such the recommendations violated almost every aspect of the Code.


G. ORDER

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 R300 000.00 within 14 days of the date of this order;
2. The second, third and fourth respondents are ordered to pay, jointly and severally, the one paying the other to be absolved the sum of R20 000.00. within 14 days of the date of this order;
3. Interest on the aforesaid amounts shall accrue at the rate of 15.5% per annum to date of final payment;

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

DATED AT PRETORIA ON THIS THE 5th DAY OF OCTOBER 2012



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS