

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

HELD IN PRETORIA

CASE NO. FOC 03153/09-10/KZN 1

In the matter between:

GRAHAM BOYNES

COMPLAINANT

and

ANDRE VAN DER MERWE

RESPONDENT

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

A. THE PARTIES

[1] The Complainant is Mr Graham Boynes, an adult male residing at No. 15 Wilden Place La Lucia 4051, Kwa-Zulu Natal.

[2] The respondent is Mr Andre van der Merwe an authorised financial services provider carrying on business at 12 Mc Iver straat, Uvongo, Kwa-Zulu Natal.

B. INTRODUCTION AND BACKGROUND

[3] This case revolves around investments made by complainants in an entity known generally as the GAREK scheme. There have been many other investors who invested in this scheme. They have lost millions of rand in the process. This Office is seized with a number of complaints relating to financial services rendered in the course of recommending investments in the GAREK scheme.

[4] Complaints and enquiries relating to the GAREK scheme were steadily coming into the Office since late 2006. In order to properly understand what the scheme was all about, it became necessary to await a report that the former Minister of Trade and Industry had commissioned against the scheme. This report was only finalised in May 2009 (The DTI Report).

[5] Essentially the GAREK scheme involved the formation of various companies which solicited investments from members of the public through the sale of unlisted shares.

[6] These shares were sold on the promise that they would increase substantially in value upon the listing of the entity in which the shares were sold on the Johannesburg Securities Exchange South Africa (JSE).

[7] The unlisted shares purchased by complainants were essentially in two connected entities namely Global Africa Resource and Energy Corporation Limited (GAREK) and Mwamko Africa Trade Resource Industrial and Commerce Corporation Limited (MATRIC).

[8] Intrinsically related to GAREK and MATRIC are several other unlisted companies amongst which we have Resourcefin Strategies International Limited (RSI); Independent Holdings Limited (IHL); Appropriate Structures in Emerging and Markets Limited (ASEM); and Holistic Resources Limited (HRL).

C. THE COMPLAINT

9.1 During the month of November 2007, the Complainant had a meeting with the Respondent in relation to future investments.

9.2 Complainant knew and accepted that the Respondent as a licensed financial advisor.

9.3 On the 26th of November 2007 the Complainant was introduced to African Gulf Energy (AGE) shares and was provided with information by Respondent on the company and its prospects. The Respondent further advised the Complainant that the listing is very soon and that it would be listed by the latest June/July 2008. According to the Complainant, the Respondent encouraged investment in GAREK on

the basis that the pre-listing share was a bargain and imminent listing will result in a substantial increase in the value of the shares. In order to benefit from the listing, Respondent advised complainant to invest immediately as the time was fast running out and the listing was due to happen very soon.

9.4 The Respondent promoted the company in glowing terms and made much of the fact that he himself had invested in AGE by taking a huge bond on his own house as well.

9.5 The Respondent pointed out and emphasised his credibility to the Complainant.

9.6 During the meeting between the Complainant and the Respondent he emphasised that this investment was conducive to the Complainant future financial requirements.

9.7 According to the Complainant, no proper needs assessment was carried out and no interviews were conducted to assess whether this investment was conducive for the Complainant and his family's future financial requirements or their present financial position.

9.8 The challenges that lay ahead for AGE and the risks associated with the investment were never mentioned or discussed.

9.9 Respondent advised complainant that the opportunity apparently was about to expire and as such the Complainant were encouraged to act expeditiously.

- 9.10 It is now common cause that the proposed imminent listing of the purchased shares never materialised. The Respondent further advised the Complainant that for various reasons, the listing dates were being postponed. Again none of these dates actually materialised.
- 9.11 As such and acting on the advice of the Respondent, the investments were made.
- 9.12 On the 27th of November 2007 the Complainant filled in and signed an application form buying shares and he also paid R25, 000.00 into an Andre van der Merwe personal bank account, at ABSA bank Margate branch.
- 9.13 Again On the 27th of November 2007 the Complainant received a letter dated 27 November 2007 confirming receipt of funds in an amount of R25, 000.00 for the purchase of African Gulf Energy PLC.
- 9.14 On the 13th of December 2007 an African Gulf Energy PLC share certificate was issued to the Complainant.
- 9.15 On the 20th of February 2008, the Complainant received a letter dated 20th February 2008 confirming receipt of funds in the amount of R25, 000.00 for the purchase of African Gulf Energy PLC and African Gulf Energy Oil PLC.

- 9.16 Total amount invested by the complainant into the Respondents bank account amounts to R50, 000.00.
- 9.17 The promised listing and several future listing dates never materialised. various reasons were advanced for the delay.
- 9.18 The complainant states he was misled by a licensed financial provider and the communication was less than adequate.
- 9.19 To date almost 4 years later no listing has taken place.
- 9.20 Respondent advised complainant that the opportunity apparently was about to expire and as such the Complainants were encouraged to act expeditiously. As such and acting on the advice of the Respondent, the investments was made.
- 9.21 The promised listing and several future listing dates never materialised. Various reasons were advanced for the delay.
- 9.22 The complainant submits that he was misled by the respondent into putting their monies into a highly risky investment.

9.23 At the time of advising the Complainant to invest, Respondent failed to disclose to the Complainant that he had an interest in GAREK and related companies. It only emerged much later in a letter written by the Respondent, that the Respondent was a member of the GAREK marketing team.

Complainant requests a return of the money that he invested plus interest on it from the 27th of November 2007.

D. THE RESPONSE

[10] As the complaint could not be resolved between the parties, it proceeded to investigation at which point Respondent was requested to provide copies of his "entire file papers".

10.1 The Respondent was also required to submit a reply to the allegations, taking into account the requirements of the FAIS Act. In particular to :
Provide a statement on how the investment was entered into with supporting documentation, if available; the exact commission earned; and specific details as to the source of the investments and the contact details of the individuals or entity that provided the investment.

The respondent's response can be summarised as follows:

10.2 The respondent chose not to deal with this claim specifically but decided to treat this claim together with other similar claims, all of which represent investments through GAREK and related companies, with reference to a letter dated 5 July 2010 which was written by the Respondent's attorney Mr Mike Werner.

10.3 The Respondent contends that the matter has not been resolved with the Complainant and allegations raised by the Complainants are rejected, based on the following reasons:

10.4 All Complainants are using "last resort" and not "first resort" procedures in that the complainants queries should be directed to the entity in which the Investment was made. He further contends that in the event of the complaint having exhausted remedies, should the FAIS Ombud become involved and that there is no record of the complainants communicating directly with the entity in which he or she invested.

10.5 FAIS Ombud is limited to deal with financial institutions, which do not fall within the jurisdiction of any other Ombud Scheme or where there is uncertainty over jurisdiction. It is then the contention of the Respondent that the Ombud has infringed its granted authority.

10.6 Most of the Complainants have laid criminal charges against the Respondent, thus the demands of the Ombuds constitutes an

infringement of the Respondent constitutional right to remain silent when a criminal investigation is pending.

10.7 The Respondent was never aggressive at any time and did not pressurise complainants to invest;

10.8 The Respondent submits that the investments are in a Capital Growth Share, not a dividend share. The time of the listing is not under the Respondent's control;

10.9 The Respondent states that he never made excuses, about the facts he merely conveyed what management of the investment companies had stated.

10.10 Respondent denies that prospectuses were prepared or necessary as all the shares were traded on a re-sale basis.

E. THE ISSUES

[11] The following are the issues to be determined:

- 11.1 Jurisdiction of this Office over the Respondent.
- 11.2 Whether the respondent rendered the financial service herein negligently and/ or in a manner which is not compliant with the FAIS Act;
- 11.3 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; and
- 11.4 The respondent was required to provide a copy of his entire file of papers. In this regard the only documents provided by respondent were a one-page document headed "APPLICATION FORM" and "MANDATE FORM" respectively. Other documents provided were deposit slips and/or bank printouts, accompanied in some instances by correspondence from complainants to respondent advising of deposits.
- 11.5 As will become clear no document evidencing any form of compliance with the FAIS Act was provided.
- 11.6 In fact to do justice to the many and varied contraventions of the FAIS Act and the Code would be voluminous. As such, and in the interests of brevity, I shall confine myself in this determination to some of the more pertinent breaches.

F. JURISDICTION

[12] The basis of this office's jurisdiction is that the Respondent is a licensed intermediary in terms of the FAIS Act and does not dispute that the investments in question were made through him as a financial service provider. This brings the matter squarely within the jurisdiction of the FAIS Ombud.

[13] The Ombud does not assume any jurisdiction over the companies introduced by the Respondent to his clients, as was suggested by the Respondent.

[14] It could be convenient at this stage, for reasons that would become clear at the rest of this determination to deal with the Respondent Attorney's submissions:

14.1 The criticism that the Complainant is resorting to "a last resort" by approaching the Ombud instead of first exhausting his remedies against the entity in which the investments was made is of no substance.

14.2 It is not in dispute that GAREK and related companies have no assets and that their shares are entirely worthless. There is no prospect that the Complainant will recover any part of his investment from GAREK.

14.3 These proceedings are not an infringement of the Respondent constitutional rights to remain silent when a criminal investigation is pending. As far as this Office was able to ascertain, the Respondent is currently not facing any prosecution.

14.4 The Respondent nevertheless did not make any election to remain silent on the contrary he responds to this Office's request in terms of Section 27 of the FAIS Act.

The Respondent further made out no case that the provisions of Section 27 are unconstitutional.

14.5 The Respondent's attorney denies that Respondent pressurised the Complainant to invest: this submission must equally be rejected. On the evidence before us, the Respondent *modus operandi* in all respect of all of his investments was to entice his clients to invest quickly or else the opportunity will pass.

14.6 Respondent attorney states that the Respondent had no control over the time of listing nor did he make any excuses on behalf of GAREK. The Respondent attorney simply missed the point.

14.7 In as much as the Respondent had no control over the listing he never the less conveyed dates to his clients on the basis that he had verified they and that they were true.

He also failed to give a full explanation to his clients of the risks inherent in such investments.

G. FINDINGS

1. For reasons set out herein and in the following determinations :

(a) A.J. HARE and ANOTHER vs. ANDRE VAN DER MERWE
case no. FOC 2759/06-07 KZN (1) A and

(b) L.W.WHEELER and ANOTHER vs. ANDRE VAN DER MERWE
case no. FOC003586/09-10/KZN 1

2. I find that the Respondent is in breach of the FAIS Act and Code of Conduct. And that

3. The Respondent be held liable for the Complainant loss

4. As a result of such a breach the Complainant was induced into investing in a financial product that was high risk and entirely unsuitable for the Complainant's profile.

5. I also find that it was the result of such breach that Complaint lost his investment, which now effectively resides in a block of worthless shares.

6. In the result I find that Respondent must be held liable for the Complainant's loss.

H. QUANTUM

1. The amount of the investment was R50.000, 00. The investment was made on the 27th November 2007.
2. Since making the investment Complainant received absolutely no return from the investment and even lost the capital.
3. It would be appropriate to make an order that in addition to re-paying the capital, Respondent must be ordered to pay interest on the capital from 27th of November 2007 to date of payment.

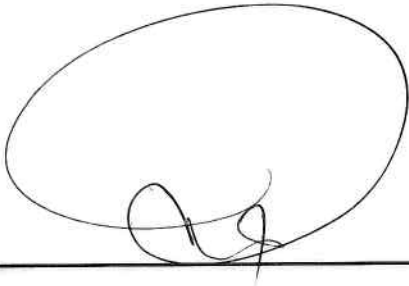
I. ORDER

I make the following order:

1. The complaint is upheld.
2. The Respondent is ordered to pay the Complainant:

- 2.1 The amount of R50,000.00
- 2.2 Interest on the amount of R50,000.00 at the rate of 15,5% from the 27th November 2007 to date of payment
3. The respondent is ordered to pay the case fee of R1, 000.00. Within 30 days of date of this determination

DATED AT PRETORIA ON THIS 4th DAY OF NOVEMBER 2010

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a smaller 'B' and a trailing flourish. The signature is positioned above a solid horizontal line.

NOLUNTU N. BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

2. The amount of RFD 001/00

3. The amount of the amount of RFD 001/00 is the total of RFD 001/00 to date is payment

4. The report is intended to show the case for RFD 001/00. Within the

DATE AT PRETORIA ON THE 15th DAY OF NOVEMBER 2010

WOLFGANG DUM

OFFICE FOR FINANCIAL SERVICES PROVIDERS