

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 4569/06 – 07/ UN 1

In the matter between:

HENDRIK JACOBUS DU TOIT

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. INTRODUCTION

- [1] This case revolves around an investment made by complainant in the GAREK scheme. Respondent's marketing of this scheme was comprehensively dealt with in a determination issued by this Office in the matter of *Adolf Jacobus Hare and Christina Elizabeth Hare vs Andre van der Merwe* FOC 2759/06-07 KZN (1) (Hare).

- [2] In the Hare determination I made reference to determinations which would follow. This is one such determination.
- [3] This is part of a batch of complaints submitted collectively by Mr Adolf Hare, a complainant in the Hare determination.
- [4] Whilst statements were obtained from each complainant, the gravamen of each complaint was materially similar. They were therefore jointly forwarded to respondent.
- [5] Respondent did not deal with each complaint individually, but elected to submit a generic response applicable to all complainants within this group. This in effect is what he describes as a “typical presentation’ to clients¹.
- [6] Whilst each complaint must, of course, be properly founded within the FAIS Act, it follows, that the material similarities both in respect of the contraventions of the FAIS Act and the history of GAREK scheme as detailed in the Hare determination lay the foundation for this and the other determinations which follow.
- [7] Importantly, the contraventions of the FAIS Act detailed in the Hare determination are almost without exception duplicated within this group of complaints.

¹ See Hare Page 13 – 15 Para 38 - 41

[8] In the result to reiterate the infringements already elucidated in the Hare determination would be superfluous. I have therefore restricted my comments to pertinent issues and, where necessary make reference to paragraphs in the Hare determination. It goes without saying that it is necessary that the Hare determination be read in conjunction with this case.

[9] The Hare determination contains a synopsis of the mandate and main findings of a report that the former Minister of Trade and Industry had commissioned against the GAREK scheme (The DTI Report) ²

B. THE PARTIES

[10] Complainant is Mr Hendrik Jacobus Du Toit a businessman residing at 4 Safari Tuine, 20 Fisskaal Avenue, Rustenberg.

[11] Respondent is Mr Andre van der Merwe, previously an authorised financial services provider carrying on business at 12 Mc Iverstraat, Uvongo, Kwa-Zulu Natal. Respondent was disbarred as a financial services provider by the Financial Services Board (FSB) on 9th November 2009.

C. THE COMPLAINT

² See Hare Page 2- 7 Para 5-12

- [12] Having been introduced to respondent by a family friend, complainant attended one of respondent's presentations in December 2004.d
- [13] At the end of the presentation he was advised by respondent that he should act expeditiously given that the offer to purchase the shares expires shortly.
- [14] In consequence he purchased R15 000, 00 worth of unlisted shares on 5th January 2005.
- [15] The advice rendered at the aforesaid presentation was in all material respects similar to that set out in the Hare determination³ and as such it would be superfluous to rehash what was conveyed to him save to say that the listing of this supposed massive company was going to result in the share price rising from R2,50 to R20.
- [16] Complainants request the return of their investments plus interest thereon.

D. THE RESPONSE

- [17] As the complaint could not be resolved between the parties, it proceeded to investigation. Respondent was requested to provide copies of his 'entire file of papers', as well as a statement detailing the manner in which the investment was entered into and the commission

³ See Hare Page 8-10 Para 16-29

earned.

- [18] The file of papers was requested in order to ascertain whether any documentation evidencing compliance with the FAIS Act existed.
- [19] Save for copies of the application and mandate forms, and copies of deposit slips and banks transfers, nothing which could assist respondent in his defence was provided.
- [20] In his reply, as mentioned in paragraph 5 supra, respondent submitted the generic response, detailed in the Hare determination.
- [21] That reply save for setting out the background to the company as well as respondent's contention that investors had been apprised of the risks involved and that a proper due diligence had been carried out proffered nothing of any substance evidencing compliance with the FAIS Act.

E. THE DETERMINATION

- [22] Respondent has effectively elected both in the Hare determination as well as in this matter before me to base his defence on the so-called typical presentation.
- [23] The issues in this matter are directly in line with those mentioned in the

Hare⁴ determination and are as follows:

- 23.1. Whether the respondent rendered the financial service herein negligently and/ or in a manner which is not compliant with the FAIS Act;
- 23.2. If it is found that the respondent did render the financial service negligently/ and or failed to comply with the FAIS Act, whether
- 23.3. such failure caused the complainant's loss; and
- 23.4. The quantum of damages.

[24] In view of the absence of any compliance documentation it stands to reason that there are multifarious material contraventions of the FAIS Act. To detail each and every contravention would be voluminous and hence I have restricted myself to some of the more pertinent issues.

Negligent or intentional misrepresentation of the product in contravention of the FAIS Act

[25] As outlined in the Hare determination⁵ it is evident that respondent as a result of his failure to carry out the most basic of due diligences, either lacked a proper understanding of the product or more seriously 'may have been complicit in a fraud perpetrated against innocent investors'.

[26] The 'various derivations and related shareholdings of GAREK are confusing and it would be fair to say that without the benefit of the DTI

4 See Hare Page 16 Para 42

5 See Hare Page 32 - 34 Para 106-115

report and time to peruse these transactions carefully it would be impossible to grasp this questionable structure⁶

[27] In reality and as exposed by the DTI report the shares purchased by complainant were worthless; investors' funds having been expended on company expenses, directors' remuneration etc. and, of course commissions.

[28] Section 7 (1) (c) (xiii) of the Code requires disclosure of appropriate information of 'any material investment or other risks associated with the product.' Clearly this information would need to be set out explicitly in any documentation or client advice record. They quite simply did not exist.

[29] According to complainant, respondent made no mention of the risks involved in this investment. Whilst respondent disputes this in his typical presentation I have already commented on this in Hare as nothing more than a fallacy. Barely two months prior to this investment respondent boasted that '*the company have (sic) achieved outstanding results, and large development has taken place in the structure.*' He went further and enticed existing clients into purchasing more shares⁷.

[30] Complainant was never in a position to understand either the structure of or the risks involved in the scheme. All respondent was interested in doing was to place more pressure on complainant to act expeditiously

6 See Hare Page 27 Para 84

7 See Hare Page 23 Para 68

given the imminent listings.

Appropriateness of advice

[31] No attempt was made by respondent to gather 'available information regarding the complainant's financial situation, financial product experience and objectives.⁸ In the circumstances there was no way in which respondent could have determined whether such a product was appropriate to complainant's needs or not.

[32] Even if one were to assume that in the event that an investment in unlisted shares was appropriate to complainant's needs one would expect that an appropriate due diligence would have been conducted into the company by the adviser prior to marketing such shares.

[33] Quite simply this did not occur⁹.

Disclosure of the advice fee

[34] The documentation provided being the mandate, application form and copies of deposit slips are essentially identical to those detailed in the Hare determination¹⁰.

[35] As I stated in Hare¹¹, other than the fact that these appear to be what I can consider options on options nowhere on either of these forms is

8 General Code of Conduct For Authorised Financial Service Providers Section 8 (1) (a)

9 See Hare Page 33 - 34 Para 109 - 115

10 See Hare Page 25 - 27 Para 77 - 84

11 See Hare Page 26 Para 81

there any indication of what complainants are actually buying.

- [36] Not only does this document inadequately disclose the essence of what is being purchased, it contains no details of any commission, charges or other expenses.
- [37] The DTI report detailed the commissions earned by respondent¹², which commission is required to be disclosed in terms of section 3 (1) (a) (vii) of the General Code. This respondent has failed to do.

Intermediary Services

- [38] The definition of a financial service encompasses both the furnishing of advice and rendering of intermediary services.
- [39] The definition of intermediary service in the FAIS Act means:-
*'...any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-
the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or...'*
- [40] The FAIS Act and its obligations came into effect on 30th September 2004, and as of this date intermediary services conducted on behalf of complainant by respondent were done so in contravention of the FAIS Act given that respondent was not so authorised in terms of section 7

12 See Hare Page 12 Para 34.2

(1) to carry out intermediary services.

[41] It is irrefutable that respondent dealt with and processed complainant's investment on 5th January 2005.

[42] Without respondent having provided the aforesaid intermediary services the transactions would not have taken place and complainant would not have lost his money.

CONCLUSION

[43] As already mentioned there are numerous other contraventions. No disclosure documentation was provided to complainant and respondent was not even licensed to sell shares, to name but a few¹³.

[44] Quite simply the advice could not have met complainant's needs, given the fact that the shares themselves are worthless.

[45] Respondent evidently did not concern himself with the fact that essentially he acted in a position of conflict of interest; his loyalties lying with GAREK and the commission which it paid¹⁴.

[46] Not only did he invest complainant in worthless shares but he has lost whatever growth he would have received, had he been appropriately invested.

13 See Hare Page 30 Para 98

14 See Hare Page 34 Para 114

[47] As stated in the Hare determination¹⁵ I have no doubt that the many violations of the Code were deliberate, and as such in inducing complainant to invest with GAREK he knowingly placed him at risk from inception.

[48] It was respondent's actions both in recommending the scheme and providing the attendant intermediary services that led directly to complainant making the investment and in consequence losing his funds.

[49] In the circumstances, I deem it appropriate not only that complainant be placed back in the position which he was prior to the investment but that interest thereon accrue from the date that the monies were invested.

I make the following order:

ORDER

The complaint is upheld and;

1. Respondent is hereby ordered to compensate complainant in the sum of R15, 000.00;

¹⁵ See paragraphs 118 of Hare Page 35

2. Interest on the aforesaid amounts shall accrue at the rate of 15.5 per cent per annum from 5th January 2005 to date of final payment;
3. Respondent is ordered to pay the case fee of R1 000, 00.

DATED AT PRETORIA ON THIS 25th DAY OF OCTOBER 2010

A handwritten signature in black ink, consisting of several loops and a long vertical stroke, is written over a horizontal line.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS