

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 4571/06 – 07/ UN 1

In the matter between:

DANIEL BURGER HEYNS

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. Whilst as will become evident, the manner in which this complainant came to learn of the scheme differs from his fellow complainants, this does not alter the fact that complainant was led to invest by the very same information that enticed other complainants in the batch. The complaints including the matter before me 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, 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

¹ See Hare Page 11 – 15 Para 31 - 41

complaints.

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 Dr Daniel Burger Heyns an ophthalmologist, residing at 49 Sandstone Road, Lethbridge, Alberta, Canada.
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. Complainant is a friend of Dr BB Meyer, the 1st complainant in a prior determination issued by this Office³. Dr Meyer informed complainant about the investment and in doing so conveyed his understanding thereof to complainant. Knowledge which in itself emanated directly from respondent. The essence of what had been conveyed to Dr Meyer is set out in his determination but for ease of reference the crux thereof is repeated hereunder:

12.1. Respondent described the company as 'mind boggling' in so far as the size and assets of the group were concerned and it was to list on the London stock exchange shortly with an impressive list of company directors.

12.2. Upon listing the share price would go rise substantially in value, and as such investors were encouraged to act expeditiously.

12.3. The risks inherent in the investment were never mentioned; on the contrary an impression was created of safe, secure and well managed company controlled by reputable directors.

13. Upon being apprised of this information by his friend, complainant also wished to invest and hence Dr Meyer contacted respondent and informed him accordingly. Respondent in turn suggested that complainant complete a form and submit proof of payment to his office.

14. Complainant in turn did as instructed and the form he completed is dated the 12th November 2004, with the accompanying deposit slip reflecting his

³ BB Meyer, I Meyer and R Meyers vs Andre van der Merwe FOC 4570/06-07 UN 1

- investment of R20 000,00 on the 16th November 2004.
15. This aligns with Dr Meyer's initial form which is also dated 12th November 2004.
 16. Needless to say complainant's experience echoed those of his co-complainants with no listing ever having taken place.
 17. Hence he requests that return of his investment plus interest thereon.

D. THE RESPONSE

18. 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 earned.
19. The file of papers was requested in order to ascertain whether any documentation evidencing compliance with the FAIS Act existed.
20. Save for copies of the application and mandate forms, nothing which could assist respondent in his defence was provided.
21. In his reply, as mentioned in paragraph 5 supra, respondent submitted the generic response, detailed in the Hare determination.
22. 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.

23. As such it is self evident that respondent made no attempt to deal specifically with the circumstances surrounding complainant's investment.

E. DETERMINATION

24. This is in all likelihood intentional on respondent's part. The investment occurred simultaneously with that of Dr Meyer's, who himself had made his investment on the advice of respondent. This same information had been conveyed to complainant a fact which respondent was aware of given that he was contacted by Dr Meyer in order to ascertain how complainant might invest.
25. As such a direct and irrefutable link between the advice rendered and the actual investment was confirmed when respondent accepted and processed the investment.
26. In doing so respondent must accept that it was his advice that led to this investment.
27. Now respondent has elected both in the Hare determination as well as well as others in the batch to base his defence on the so-called typical presentation.
28. Therefore the issues in this matter are directly in line with those mentioned in the Hare⁴ determination and of relevance to this matter, Dr Meyers determination. It also stands to reason that in effect they duplicate Dr Meyers matter. They are:

⁴ See Hare Page 16 Para 42

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

28.2. 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

28.3. The quantum of damages.

29. 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

30. 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'.

31. The 'various derivations and related shareholdings of GAREK are confusing and it would be fair to say that without the benefit of the DTI report and time to peruse these transactions carefully it would be

⁵ See Hare Page 31 - 34 Para 102-115

impossible to grasp this questionable structure.⁶

32. 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.
33. 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.
34. On the evidence complainant was not made aware 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 four months after this investment respondent boasted that '*the company have (sic) achieved outstanding results, and large development has taken place in the structure.*'
35. Complainant was never in a position to understand either the structure of or the risks involved in the scheme.

Appropriateness of advice

36. No attempt was made by respondent to gather 'available information regarding the complainant's financial situation, financial product

⁶ See Hare Page 27 Para 84

experience and objectives.⁷ 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.

37. 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.

38. Quite simply this did not occur⁸.

Disclosure of the advice fee

39. The documentation provided being the mandate and application form are essentially identical to those detailed in the Hare determination⁹.

40. As stated in Hare¹⁰, other than the fact that these appear to be what I can consider options on options nowhere on either of these forms is there any indication of what complainant is actually buying.

41. 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.

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

8 See Hare Page 33 - 34 Para 109 - 115

9 See Hare Page 25 - 27 Para 77 - 84

10 See Hare Page 26 Para 81

42. The DTI report detailed the commissions earned by respondent¹¹, 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.

CONCLUSION

43. As already mentioned there are numerous other contraventions. No disclosure documentation was provided to complainant and neither is there a record of advice. Respondent was not even licensed to sell shares, to name but a few¹².
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 paid¹³.
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.

11 See Hare Page 12 Para 34.2

12 See Hare Page 30 Para 98

13 See Hare Page 34 Para 114

47. As stated in the Hare determination¹⁴ 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. 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.

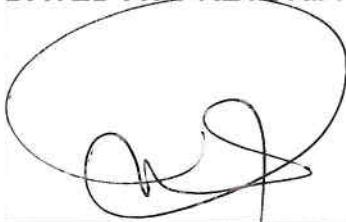
I make the following order:

ORDER

The complaint is upheld and;

1. Respondent is hereby ordered to compensate complainant in the sum of R20, 000.00;
2. Interest on the aforesaid amount shall accrue at the rate of 15.5 per cent from 16th November 2004 to date of final payment;
3. The respondent is ordered to pay the case fee of R1,000.00.

DATED AT PRETORIA ON THIS 25th DAY OF JANUARY 2011



NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDER

¹⁴ See paragraphs 118 of Hare Page 35

