



[2] The 2<sup>nd</sup> Complainant is Mr Frank Stuart Adair McCarter residing at No. 2 Surtees Place Umtetweni 4235, Kwa-Zulu Natal.

[3] 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**

[4] 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.

[5] 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).

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

[7] 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).

[8] 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).

[9] 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) and AGE.

### **C. THE COMPLAINT**

[10] During October 2008, the First Complainant and her husband, the Second Complainant approached the Respondent to give them financial advice on how to invest their life-savings.

10.1 Complainant knew the Respondent as a licensed financial advisor and as the Respondent's son was in the same school with the Complainants' daughter.

10.2 The Complainants were introduced to AGE shares and were provided with information by Respondent on the company and its prospects. The Respondent further advised the Complainants by drawing a sketch plan, explaining AGE off-shore oil shares and that an imminent listing was due to take place through Deutsche Bank sponsors and on the Dubai stock exchange.

10.3 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 and that his secretary had invested all her savings into AGE shares.

10.4 The Respondent emphasised his credibility by pointing out the involvement of the President of Liberia in AGE off-shore oil shares.

10.5 During the meeting between the Complainants and the Respondent the latter emphasised that this investment was conducive to their future financial requirements, reason being that the Second Complainant was working in Uganda and such investments will enable the second Complainant to come home permanently and he will stop working within a short period of time.

10.6 No interview was conducted to assess whether this investment was conducive for the Complainants and their future financial requirements or their present financial position.

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

10.8 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 were made.



10.9 On the 15<sup>th</sup> of October 2008 the Complainant paid R300,000.00 ( Three hundred thousand rand) into an AGE bank account at ABSA bank Shelly Beach branch.

10.10 On the very same day the 15<sup>th</sup> of October 2008, the second Complainant invested R300 000.00 into the AGE bank account as indicated above and their children namely: Tammy and Kelly invested R10,000.00 each in the very same bank account as indicated above.

10.11 Total amount invested by the complainants into the AGE bank account on the 15<sup>th</sup> of October 2008 amounted to R620, 000.00.

10.12 On the 16<sup>th</sup> of October 2008, African Gulf Energy PLC share certificates were issued to Mr McCarter Frank Stuart Adair, Mrs McCarter Adeline and Ms McCarter Kelly Margaret Adair.

10.13 On the 21<sup>st</sup> of October 2008 another African Gulf Energy PLC share certificate was issued to Mr McCarter Tamaryn Adair.

10.14 Before the end of November 2008 the Respondent contacted the Complainants and advised them that seeing that there were existing

shareholders, they had an opportunity to purchase additional shares for their children. They were advised to take up this opportunity because of excellent returns.

10.15 On the 6<sup>th</sup> of November 2008 the Complainant and her family made another deposit of R40, 000.00 into AGE bank account as stated above, meaning within a period of less than a month the complainants had invested R660, 000.00 into AGE shares as advised by the Respondent.

10.16 On the 11<sup>th</sup> of November 2008 two other African Gulf Energy PLC share certificates were issued to Ms McCarter Kelly Margaret Adair and to Mr McCarter Tamaryn Adair.

10.17 The promised listing and future listing dates never materialised. On the 1<sup>st</sup> of December 2008 the complainant's husband came across negative articles on GAREK on the internet. The Complainant confronted the Respondent regarding these allegations which he simply dismissed.

10.18 On the 12<sup>th</sup> of December 2008 the Complainants received an e-mail informing them that the listing will take place before the 22<sup>nd</sup> of December 2008.

10.19 On the 5<sup>th</sup> of February 2009 the Complainants received another e-mail explaining why the shares are not listed yet and providing them with a new date of listing on or around June 2009.

10.20 During the month of August 2009 the Respondent visited the Complainants' house and informed the family that the listing was on track. The Respondent further advised the family about another new investment opportunity called "New Zealand Silicone". They were advised to take up this opportunity because it was faster and it would pay out sooner than the AGE shares. The Complainant did not take up this additional offer.

10.21 The promised listing and several future listing dates never materialised. Various reasons were advanced for the delay. On the 16<sup>th</sup> of October 2009 the Complainants received a letter from the Respondent's lawyers, stating that the Respondent has no legal obligation to refund their investment amounting to R660, 000.00. The lawyers further stated that the investment is re-saleable and not refundable and that the complainants must give the Respondent a mandate to sell their shares or they can sell their shares themselves and that if the Respondent sells their shares there is no guarantee of a time frame.



10.22 The complainants state they were misled by a licensed financial services provider and the communication was less than adequate.

10.23 To date, almost 3 years later, no listing has taken place. Complainant and her family have requested a return of the money that they have invested plus interest on it from the 15<sup>th</sup> of October 2008.

#### **D. THE RESPONSE**

[11] 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”.

11.1 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:

11.2 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.

11.3 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:

11.4 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 only in the event of the complainant having exhausted his remedies against GAREK, 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.

11.5 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.

11.6 Most of the Complainants have laid criminal charges against the Respondent, thus the demands of the Ombud constitutes an infringement of the Respondent`s constitutional right to remain silent when a criminal investigation is pending.

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

11.8 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;

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

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

## **E. THE ISSUES**

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

12.1 Jurisdiction of this Office over the Respondent.

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

12.3 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

12.4 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.

12.5 As will become clear no document evidencing any form of compliance with the FAIS Act was provided.



12.6 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**

[13] 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.

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

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

15.1 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 were made, is of no substance.

15.2 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.

15.3 These proceedings are not an infringement of the Respondent’s 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.

15.4 The Respondent never the less did not make any election to remain silent, on the contrary he responded 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.

15.5 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’s *modus operandi* in respect of all of his investments was to entice his clients to invest quickly or else the opportunity will pass.

15.6 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.

15.7 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 them and 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

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

- 1.3. The Respondent be held liable for the Complainants' loss.
2. As a result of such a breach the Complainants were induced into investing in a financial product that was high risk and entirely unsuitable for their profile.
3. I also find that it was the result of such breach that Complainants lost their investment, which now effectively resides in a block of worthless shares.
4. In the result I find that Respondent must be held liable for the Complainants' loss.

#### **H. QUANTUM**

1. The amount of the investment was R660.000, 00. The investment was made on the 15<sup>th</sup> of October 2008.
2. Since making the investment Complainants received absolutely no return from their 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 15<sup>th</sup> October 2008 to date of payment.

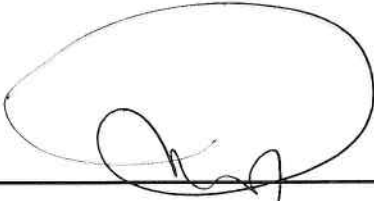


## I. ORDER

I make the following order:

1. The complaint is upheld.
2. The Respondent is ordered to pay the Complainant:
  - 2.1 The amount of R660,000.00
  - 2.2 Interest on the amount of R660.000.00 at the rate of 15,5% from the 15<sup>th</sup> of October 2008 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**



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**NOLUNTU N. BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**