

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 4566/06 – 07/UN 1

In the matter between:

JACOBUS FRANCOIS MEYER

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 recent 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 the third such determination.

- [3] This complaint 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.
- [8] In the result to reiterate the infringements already elucidated in the Hare determination would be superfluous. I have therefore restricted my

¹ See Hare Page 13 - 15 Para 38

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 Jacobus Francois Meyer, a customer service representative residing at 10 Norwin Street, White River, Mpumalanga.

- [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

- [12] In December 2004 complainant was informed by his mother, an existing client of respondent, about a new investment opportunity; a company

² See Hare Page 2 - 7 Para 5 - 11

which was to list on the stock exchange in several countries.

[13] In consequence he purchased R7 500, 00 rand's worth of shares from respondent on 13th December 2004.

[14] Later in the month, complainant was invited to attend a typical presentation by respondent.

[15] Complainant was introduced to GAREK, and provided information by respondent on the company and its prospects. He was advised of an imminent listing in three countries. Upon listing, shares purchased by complainants for R2, 50 were projected to reach R20, 00.

[16] This return was compounded by the fact that the structure of the investment was such that they automatically received two shares in GAREK for every MATRIC share purchased.

[17] Respondent promoted the company in glowing terms and made much of the fact that he himself had invested in excess of R1 million in MATRIC shares.

[18] The assets of the company were reportedly substantial amounting to some R5, 4 billion. Complainant was shown an article in the Time magazine which painted the company in a very positive light; supportive of respondent's claims as to the soundness of the investment. In reality

this article was merely promotional material placed on a limited number of copies of TIME magazine. The information contained therein was neither endorsed nor verified by TIME magazine. In short it was an advertorial taken out by GAREK itself.

[19] Respondent pointed out an impressive list of company directors,³ amongst them, the former president of Botswana, Sir Ketumile Masire.

[20] No interview was conducted to assess whether the investment was suitable to either his future or present financial position.

[21] The risks associated with the investment were never mentioned or discussed.

[22] Respondent advised complainant that the opportunity apparently expired at the end of December 2004 and as such the complainants were encouraged to 'act expeditiously.'

[23] As such and acting on the advice of respondent, complainant made a further investment of R7 000, 00 on 31st December 2004.

[24] The promised listing and several future listing dates never materialised. Various reasons were advanced for the delay, several of which supposedly offered increased shareholder value. In addition various

³ See Hare Page 9 Para 21

company annual financial statements were not issued.

[25] Complainant requests the return of the investment of R14 000, 00 plus interest.

D. THE RESPONSE

[26] 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.

[27] The file of papers was requested in order to ascertain whether any documentation evidencing compliance with the FAIS Act existed.

[28] 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.

[29] In his reply, as mentioned in paragraph 5 supra, respondent submitted the generic response, detailed in the Hare determination⁴.

[30] That reply save for setting out the background to the company as well as respondent's contention that investors had been appraised of the

⁴ See Hare Page 11 - 15 Para 31 - 41

risks involved and that a proper due diligence had been carried out proffered nothing of any substance evidencing compliance with the FAIS Act.

D. THE DETERMINATION

[31] 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.

[32] The issues in this matter are directly in line with those mentioned in the Hare⁵ determination and are as follows:

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

32.2 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

32.3 The quantum of damages.

[33] In view of the absence of any compliance documentation it stands to

⁵ See Hare Page 16 Para 42

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

[34] As outlined in the Hare determination⁶ 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'.

[35] 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 impossible to grasp this questionable structure⁷,

[36] 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.

[37] Section 7 (1) (c) (xiii) of the General Code of Conduct for Authorised Financial Services Providers requires disclosure of appropriate

6 See Hare Page 31 - 34 Para

7 See Hare Page 27 Para 84

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.

[38] 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 shares⁸.

[39] 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 him to act expeditiously given the imminent listings.

Appropriateness of advice

[40] No attempt was made by respondent to gather 'available information regarding the client's financial situation, financial product experience and objectives.'⁹ In the circumstances there was no way in which respondent could have determined whether such a product was

8 See Hare Page 23 - 24 Para 68 - 70

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

appropriate to complainant's needs or not.

[41] 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.

[42] Quite simply this did not occur¹⁰.

Disclosure of the advice fee

[43] The documentation provided being the mandate, application form and copies of deposit slips are essentially identical to those detailed in the Hare determination¹¹.

[44] As I stated in Hare¹², 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 complainants are actually buying.

[45] Not only does this document fail to adequately disclose the essence of what is being purchased, it contains no details of any commission, charges or other expenses.

10 See Hare Page 33 - 34 Para 109 - 115

11 See Hare Page 25 - 27 Para 77 - 84

12 See Hare Page 26 Para 81

- [46] The DTI report detailed the commissions earned by respondent¹³, 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.

Rendering an intermediary Service

- [47] The definition of a financial service does not only envisage advice, but also encompasses an intermediary service.

- [48] 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...’

- [49] It is apparent that the definition is particularly broad, and given that respondent was not licensed to render advice or provide an intermediary service in respect of shares¹⁴ it follows that his actions in selling complainant such on 13th December 2004 was in contravention of the FAIS Act.

- [50] The sale on the aforementioned date does not fall within the advice aspect of the definition, but is instead an intermediary service, given that at this stage complainant had not yet met with respondent. However he was fundamental in the implementation and processing of the application forms.

- [51] In addition he earned commission thereon.

13 See Hare Page 12 Para 34.2

14 See Hare Page 30 Para 98

CONCLUSION

- [52] As already mentioned there are numerous other contraventions. No disclosure documentation was provided to complainant and respondent failed to employ appropriate risk control measures.
- [53] Quite simply the advice could not have met complainant's needs, given the fact that the shares themselves are worthless.
- [54] 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 paid¹⁵.
- [55] Not only did he invest complainant in worthless shares but he has lost whatever growth he would have received, had he been appropriately invested.
- [56] As stated in the Hare determination¹⁶ 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.
- [57] But for respondent's action either in providing advice or an intermediary service, complainant would not have made this investment.

15 See Hare Page 34 Para 114

16 See Hare Page 35 Para 118

[58] In the circumstances, I deem it appropriate not only that complainants be placed back in the position which they were 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 the complainant in the sum of R14 000, 00;
2. Interest on the aforesaid amounts shall accrue at the rate of 15.5 per cent per annum on each of the amounts as follows:-
 - a. On the sum of R7 500, 00 with effect from 13 December 2004;
 - b. On the sum of R7 500, 00 with effect from 31st December 2004 to date of final payment;
3. Respondent is ordered to pay the case fee of R1 000, 00.

DATED AT PRETORIA ON THIS 31 DAY OF MARCH 2010

A handwritten signature in black ink, enclosed within a hand-drawn oval. The signature is stylized and appears to read 'Noluntu Nellisa Bam'. Below the signature is a solid horizontal line.

**NOLUNTU NELLISA BAM
OMBUD FOR FINANCIAL SERVICES PROVIDER**